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REPORTS OF CASES

DECIDED IN THE

COURT OF QUEEN'S BENCH.

BY

JAMES LUKIN ROBINSON, ESQ.

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

VOL. VII.

CONTAINING THE CASES DETERMINED
FROM TRINITY TERM, 13 VICTORIA, TO EASTER TERM, 14 VICTORIA:
WITH A TABLE OF THE NAMES OF CASES ARGUED,
AND DIGEST OF THE PRINCIPAL MATTERS.

TORONTO:

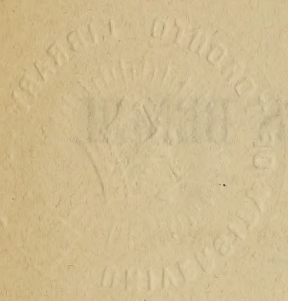
HENRY ROWSELL.

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REPORTS OF CASES

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COURT OF QUEEN'S BENCH

JAMES LILLIE KIRKMAN

ATTORNEY AT LAW AND NOTARY PUBLIC

VOL. VII

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J U D G E S
OF
THE COURT OF QUEEN'S BENCH.

DURING THE PERIOD OF THESE REPORTS:

THE HON. JOHN BEVERLEY ROBINSON, C. J.
" WILLIAM HENRY DRAPER, J.
" ROBERT E. BURNS, J.

Attorney-General ;
THE HON. ROBERT BALDWIN.

Solicitor-General :
JOHN SANDFIELD McDONALD, Esq.

A

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REPORT OF CASES
IN THE
QUEEN'S BENCH AND PRACTICE COURTS.

PRACTICE COURT,
MICHAELMAS TERM, 13 VICTORIA.

Before THE HON. MR. JUSTICE DRAPER.

WHITE V. PETCH AND MANNING.

Ca. sa.—*Bail*—*Certificate of Clerk of Crown and Pleas, under 10 & 11 Vic. ch. 15, sec. 5*—*Notice of bail to plaintiff in the cause*—*Sheriff's liability after certificate delivered*—*Attachment against sheriff set aside.*

The bail-piece need not set out the writ on which the defendant has been arrested. It is not therefore necessary that the certificate of the Clerk of the Crown and Pleas, of the defendant's having filed a recognizance of bail, and affidavit of the justification of bail (under 10 & 11 Vic. ch. 15, sec. 5), should state the writ on which the defendant has been arrested.

Quære.—Should the Clerk of the Crown and Pleas grant a certificate, until he is satisfied that due notice of bail has been given to the plaintiff in the cause?—5 U. C. R. 516.

Where a sheriff returns *cepi corpus* to a writ of *ca. sa.*, and the plaintiff rules the sheriff to bring in the body, and, the sheriff not complying with the terms of the rule, the plaintiff then obtains a rule for an attachment against the sheriff for not bringing in the body of the defendant at the return of the rule to that effect; *Held, per Cur.*, that it is a good answer to such rule for an attachment, to shew by affidavit, that the defendant was arrested under a *ca. sa.*, and placed in close custody, and was afterwards discharged from close custody and admitted to the limits by virtue of a certificate of the Clerk of the Crown and Pleas annexed to the affidavit, and that he had not since been committed to close custody by any process whatever.

Leith obtained a rule nisi for an attachment against the sheriff of the Home District, for not bringing into court the bodies of the defendants, at the return of the rule to that effect, served on him on the 18th October last. His affidavits shewed, that to an *al. ca. sa.* against the defendants, returnable the last day of Trinity Term, the sheriff had returned *cepi corpora*; that he had been served with a rule

to bring in the body, but has not had hitherto in his custody or under his controul the bodies of the defendants, nor has he complied with the terms of that rule in any manner.

Cause was shewn on an affidavit, that the defendants were arrested under the *al. ca. sa.*, and placed in close custody, and were afterwards discharged from close custody, and admitted to the limits by return of a certificate of the Clerk of the Crown and Pleas, annexed to the affidavit; and that they have not since been committed to close custody by any process whatever.

The statute 10 & 11 Victoria, chap. 15, sec. 5, enacts—
“That every person arrested on any process, who is entitled by law to the benefit of the jail limits, and is desirous of obtaining the same, may enter into a recognizance of bail or bail-piece, with two sufficient sureties, under a condition that such person shall remain and abide within the limits of the jail of the district where such person shall have been arrested, and not depart therefrom unless released by due course of law; and shall obey all notices, orders and rules of court, touching such person remaining upon the limits, or being remanded or ordered to close custody therefrom. And such sureties shall, immediately upon entering into the recognizance, justify, by affidavit, in double the amount for which such person shall have been arrested; and such recognizance shall then be filed in the office of the Clerk or Deputy Clerk of the Crown, or Clerk of the District Court, as the case may be, of the district *in which the arrest was made*. And notice of such recognizance, and of the sureties therein, shall be forthwith given to the plaintiff or party at whose instance such arrest took place, in the same manner as in the case of bail to the action. And on production to the sheriff by whom the arrest was made, of a certificate from the Clerk or Deputy Clerk of the Crown, or Clerk of the District Court of such district, *that such recognizance of bail and affidavit of the justification have been filed in his office*, it shall be lawful for the sheriff to admit such person so arrested to the limits; and the sheriff shall be discharged from *all* responsibility respecting such person *after* such admission to the limits, unless again committed to the close

custody of such sheriff in due form of law, subject to an exception to be entered to such bail as is now provided in cases of special bail, or by such rules as the Court of Queen's Bench may direct and appoint."

The Clerk of the Crown and Pleas, on the 10th August, 1849, certified, that the defendants had on that day filed in his office a recognizance of bail or bail-piece, with affidavits of justification and of due taking, entered into by the defendants, in order that they might be admitted to the limits of the jail of the Home District, giving the names and additions of the bail for the defendants, on a writ of *capias ad satisfaciendum*, issued in this cause. A copy of the bail-piece was also put in, by which it appeared that defendants were delivered to bail upon a writ of *capias ad satisfaciendum*; that the defendants themselves had not entered into the recognizance, but the two sureties only; and on affidavit that on application at the sheriff's office for inspection of the certificate of the Clerk of the Crown, the agent for plaintiff's attorney was informed that it was in possession of the defendants' attorney; and that on the plaintiff's attorney applying there, the certificate could not be found: and the agent swore, further, that he believed no notice of justification whatever was given to the plaintiff's attorney or the agent.

Leith insisted that his application was necessary, as the sheriff's return would be evidence in the event of any action being brought against the Clerk of the Crown; and the sheriff's return to the *ca. sa.* was, that he had taken the defendants, whose bodies he had ready—citing *Gyfford v. Woodgate*, 11 Ea. 297; and *Caton v. Stoker*, 1 M. & S. 599: that the sheriff should have entered specially the facts; that the certificate was no answer to the rule for attachment for not bringing in the body, pursuant to the rule to that effect, which was in force, and not set aside or moved against; that the certificate was insufficient, not shewing that the bail entered into a recognizance, or that it was given in respect of the arrest under an *AL. ca. sa.*, but, on the contrary, it referred to a writ of *ca. sa.*; and that the sheriff would not have been liable to an action for refusing, on

production of this certificate, to admit the defendants to the limits, as they were not in his custody on the writ named in the certificate, but on an *alias ca. sa.*

DRAPER, J.—I do not find in any of the forms given in the books of practice, that it is usual to set out the writ on which the defendant has been arrested. The form is, that the defendant (naming him) is “delivered to bail on a *cepi corpus.*” Instead of this, the present bail-piece is, “Robert Petch and Alexander Manning are delivered to bail upon a writ of *capias ad satisfaciendum,*” and the certificate of the Clerk of the Crown corresponds. If it were necessary that the bail-piece should state the writ on which the defendants were arrested, this objection might be important; but as this is not required by the practice, I think it should not prevail.

Then the certificate does contain all that the statute requires—namely, a statement that the recognizance of bail and the affidavit of justification were filed in the office of the Clerk of the Crown—and the sheriff is expressly authorised, on the production of *that* certificate, to admit the parties in his custody to the limits, and is, in so many words, discharged from all responsibility respecting such parties, after they are admitted to the limits.

Whether the Clerk of the Crown should have granted the certificate until he was satisfied due notice of bail had been given, may be more questioned, especially since the suggestion thrown out in the judgment of this court, in *Mills v. Jarvis*, 5 U. C. Rep. 516. It certainly was the intention of the legislature that the plaintiff in the cause should have the opportunity of excepting to the bail put in; and though the enactment regarding the exception immediately follows the declaration that the sheriff shall be released from all responsibility unless the debtor be again committed to close custody, I do not treat the latter part as qualifying the sheriff's release from liability, but am rather disposed to view the whole intent of the clause to be rather that the bail shall be perfected before the Clerk of the Crown gives his certificate, than that the liability of the sheriff shall be contingent on the result of an exception to the bail made after

the debtor has, in consequence of the certificate, been admitted to the limits. The last section in the act shews, I think, that from the moment the debtor is released from close custody, under the 5th section, he is no longer in the custody of the sheriff, but of his bail. Whether, under the words of the 5th section, the court will feel warranted in determining that the Clerk of the Crown should refuse to certify unless the bail are perfected, and a rule for their allowance taken out, it is not now necessary to determine; but if it had been expressly enacted that the sheriff should not discharge the prisoner from close custody until he was served with the rule for the allowance of the bail, as bail to the limits, the certificate of the Clerk of the Crown would have been unnecessary, and the plaintiff in the cause would have proper notice of the putting in bail, and a reasonable opportunity of satisfying himself of their sufficiency, while the officers of the court would not have the responsibility cast on them of enquiring—the one, whether he ought to grant the certificate; the other, whether it is sufficient to warrant the discharge of the prisoner.

I observe it is sworn that the plaintiff had no notice of bail, and he was therefore warranted in ruling the sheriff to bring in the bodies, seeing the debtors at liberty, without his being apprised of any lawful discharge from close custody; and as the sheriff took no notice of that rule, his only proceeding was to move for an attachment. I think the answer given by the sheriff sufficient, and that the rule must be discharged, but that it should be without costs.

Per Cur.—Rule discharged, without costs.

TRACEY V. HODGEST.

Award, setting aside of.

The court will not *intend* matter for the purpose of setting aside on award—such matter must be shewn *affirmatively*.

An award may be made *before* the time to which the arbitrators had made an enlargement.

The objection to the rule *nisi*, for setting aside an award—that it is not drawn up, “on reading the award,” is well answered by shewing, that among “the affidavits and paper filed,” on reading which the rule was drawn up, there was a copy of the award verified by affidavit.

This cause, and all matters in difference between the

parties, was referred to three arbitrators, or any two of them, so as their award should be made on or before the first July, 1849. Costs of the cause to abide the event of the award, and costs of the reference to be in the discretion of the arbitrators.

On the 25th June, the arbitrators, at the request of the defendant, enlarged the time for making the award until the 10th day of July, though the memorandum endorsed on the order of reference, was actually signed on the 29th June. The arbitrators, on the 6th July, made their award—that Tracey “had good cause of action” against Hodgest, to the amount of 121*l.* 3*s.* 4*d.*, and that Hodgest should pay that sum as follows: 60*l.* 11*s.* 8*d.* on the first August, and 60*l.* 11*s.* 8*d.* on the first November, then next. They specially awarded respecting the collection of certain debts due Tracey and Hodgest, on account of the business theretofore carried on between them, that neither party should have any action against the other by reason of anything that might have happened prior to the date of the award; that Hodgest should pay the costs of the action, to be taxed by the proper officer, and they awarded respecting the costs of the reference and award, and concluded by awarding that Tracey should “accept the several sums of money and costs, herein by us awarded, to be paid in full satisfaction and discharge of all demands against” Hodgest, and that Hodgest “has no further claim or demand against the said Tracey.”

A. Wilson obtained a rule *nisi*, in Trinity Term last, to set aside this award; 1st, because there being several issues in this cause, the arbitrators have not disposed of the same, by which the costs of the cause cannot be properly taxed or apportioned, and it is uncertain how much of the cash, if any, the defendant is to pay.

2nd. Because, after the enlargement to the 10th July, the arbitrators, without notice to defendant, proceeded and made their award before that day.

3rd. Because the award is not conclusive, the arbitrators not having decided all matters in difference.

D. B. Read objected, 1st, that this rule was not drawn

up on reading the pleadings, or any affidavit verifying them ; and the only information respecting the issue is in an affidavit stating that " the action is brought on a sealed instrument containing a variety of agreements between the plaintiff and defendant," and that there " are a number of pleas pleaded to the said action by the defendant, upon all of which, as this deponent verily believes, issue " had been joined before the submission was entered into."

2nd. That the rule was not drawn up on reading the award.

3rd. That the rule was granted on the last day of term.

4th. That the last objection taken to the award, is insufficient, in not shewing in what particular the award was not final or conclusive, or what is left undisposed of.

He also filed affidavits of the three arbitrators, that they " were not required or expected, by either of the parties, to find specifically, or otherwise, on the issues in law which were joined ; that the arbitrators were all unprofessional, and were required to find the balance of accounts due to plaintiff or defendant, and determine all matters in dispute without reference to a specific finding on the issues in law." And he filed the affidavits of all the arbitrators, that on the 28th June they enlarged the term at the earnest request of defendant ; that they met and sat on the 29th, and heard the defendant, and on the close of that day the plaintiff and defendant were asked if they had any further evidence to offer, when they both acknowledged they had no further evidence to offer, and therefore the arbitrators, on the 6th July, made the award.

The affidavit of the defendant, on which Wilson obtained the rule *nisi*, admitted the enlargement to have been made on the 28th June, and that on the 29th, he and his attorney attended before the arbitrators, but that he (defendant) never received notice of any subsequent meeting of the arbitrators ; that, on the 9th July, defendant sent to one of the arbitrators a letter with two vouchers, for sums amounting to upwards of 10*l.*, for the purpose of having the same taken into consideration in his favour—which the arbitrator immediately returned, informing defendant that he had

nothing further to do respecting the same.—See 12 M. & W. 708; 13 M. & W. 671.

DRAPER, J.—The pleadings are not before the court on this motion—not even the form of action. It may have been debt, or covenant, or possibly some other form of action. Nor is it shewn what the pleas were, or the issues on them, from any affidavit before the court; though it appears by the affidavit filed on obtaining the rule *nisi*, that there were several pleas; and the affidavits in reply, lead to the inference that there were issues in law. Unless an award that the plaintiff had good cause of action to the amount specified on these statements, leaves something undisposed of—some point on which the court may be called on to decide—this ground fails. Now, I think, this will not be *intended* for the purpose of setting aside the award; and for want of its being *shewn* affirmatively, I am of opinion I ought to overrule this objection.—Allan v. Lowe, 4 Q. B. 66, and the cases there cited.

The second objection cannot prevail. For as to the defendant not being heard *at all* after the postponement, it appears that the enlargement was made on the 28th June; that the defendant was heard on the 29th, and all the three arbitrators swear, that at the close of that day, both plaintiff and defendant admitted they had no further evidence to offer. It appears to me, that under these circumstances the arbitrators were not bound to wait until the last hour for making their award; and the case of Davison v. Gauntlett, 1 Dowl. N. S. 198; 3 M. & Gr. 550, shews that an award may be made before the time to which the arbitrators had made an enlargement. And moreover, the affidavit of the defendant, as to the “vouchers” he enclosed, does not go far enough, for it does not shew but that they related to matters already heard, or that they could have affected the decision, if proved to the satisfaction of the arbitrators, and if he had not previously admitted that he had no further evidence to offer.

As to the last objection, I see nothing but what is involved in the decision of the first and second.

The objection raised by Mr. Read, that the rule is not

not drawn upon reading the award, is answered by shewing that among "the affidavits and paper filed," on reading which the rule was drawn up, there was a copy of the award verified by affidavit—3 Dowl. 449-5, 597; 2 M. & W. 391; 6 A. & E. 119.—But as the objections raised to the award fail, the rule must be discharged.

Per Cur.—Rule discharged.

THE QUEEN V. HAYSTEAD.

Conviction by magistrate quashed—Tolls on Albion Plank Road, when to be collected.

Held, per Cur., that the following conviction—" *Home District, to wit.*—Be it remembered, that on the 16th day of January, in the year of our Lord 1849, at the city of Toronto in the district aforesaid, Thomas Haystead is convicted before me, S. G. Lynn, one of her Majesty's justices of the peace for the said district, for that he, the said Thomas Haystead, did, on the 4th day of January, inst., evade payment of toll at the toll-gate situated on the Vaughan branch of the Albion planked road; and I, the said justice, adjudge the said Thomas Haystead, for his said offence, to forfeit and pay ten shillings, and also to pay the sum of thirteen shillings and seven pence for costs; and in default of immediate payment of the said sums to be imprisoned in the gaol of this city for the space of one month, unless the said sums shall be sooner paid; and I direct that the said sum of ten shillings shall be paid to the Albion Road Company; and I order that the said sum of thirteen shillings and seven pence for costs shall be paid to me the convicting justice. Given under my hand and seal, &c."—was bad, in omitting; 1st. Any statement of the information. 2ndly. The summons and appearance or default of the accused. 3rdly. His plea denying or confessing. 4thly. The evidence. *Also*, in not shewing that any toll was claimed—or what toll—or how imposed—or that any could be claimed or imposed by reason of the completion of the road, or of any part of it. *Also*, because it did not appear therein that the defendant had proceeded on the road with any carriage or animal liable to pay toll, and after turning out of the road had returned to or re-entered it, with such carriage or animal, beyond a toll-gate, without paying toll, whereby payment was evaded.

Seemle, that tolls on the Vaughan Branch of the Albion Plank Road can only be collected when the road is made, according to the requisition contained in the 33rd sec. of statute 9 Vic. ch. 88.

Ewart obtained a rule nisi to set aside the conviction of Thomas Haystead, which was as follows:

" *Home District, to wit.*—Be it remembered, that on the 16th day of January, in the year of our Lord 1849, at the city of Toronto, in the district aforesaid, Thomas Haystead is convicted before me, S. G. Lynn, one of her Majesty's justices of the peace for the said district, for that he, the said Thomas Haystead, did, on the 14th day of January, instant, evade payment of toll at the toll-gate situated on the Vaughan branch of the Albion planked road; and I, the said justice, adjudge the said Thomas Haystead, for his said offence, to forfeit and pay ten shillings, and also to pay the sum of

thirteen shillings and seven pence for costs, and in default of immediate payment of the said sums to be imprisoned in the gaol of this city for the space of one month, unless the said sums shall be sooner paid, and I direct that the said sum of ten shillings shall be paid to the Albion Road Company, and I order that the said sum of thirteen shillings and seven pence for costs shall be paid to me the convicting justice.

Given under my hand and seal, &c."

He objected; 1st. That no information is recited in the conviction.

2ndly. That it does not appear by the conviction that Haystead was summoned.

3rdly. That it does not appear whether Haystead appeared or heard the charge.

4thly. That no evidence against Haystead is set forth therein.

5thly. That there is no proper adjudication.

6thly. That the statute under which the conviction is made does not authorize the justice to inflict imprisonment as is done therein.

7thly. That the judgment is not warranted by the statute, though Haystead were guilty.

8thly. That under the circumstances appearing on the depositions on which the conviction is founded, no offence was committed against the statute.

9thly. That no offence against the statute is stated in the conviction.

10thly. That the branch road referred to in the conviction, according to the depositions was, unfinished, and therefore no toll was legally demandable from Haystead for travelling thereon.

Vankoughnet shewed cause.

The Albion Road Company is incorporated by statute 9 Vic., ch. 88. The 20th section enacts, that if any person shall, after proceeding on the said road with any *carriage or animal liable to pay toll*, turn out of the said road into any other road, and shall enter the said road beyond any gate without paying toll, whereby such payment shall be

evaded, such person for each offence shall forfeit not exceeding 5*l.* nor less than 10*s.*, and any one justice of the peace shall, on conviction, fine such offender in the said penalty, and from his judgment there shall be no appeal. The 19th section provides for the levying of penalties by distress and sale of the offender's goods and chattels, under the authority of a justice's warrant, and in case there are no goods and chattels to satisfy such warrant the offender may be committed to the gaol of the Home District for any period not exceeding twenty days. The 15th section empowers the directors, among other things, to make rules and regulations "concerning the tolls of the road;" and the 16th section empowers the president and directors from time to time to order and establish the rates of toll payable by persons 'travelling on the road. And the 1st section provides, that as soon as three miles of the road shall have been completed, it shall be lawful for the directors of the company to put up and erect a toll-gate thereon, and collect such tolls as the directors may think expedient to be levied and taken from persons travelling along the road. While the 38th section, which relates in terms to a continuation of the road "from its present intended termination at Geddes's Corner," and to a branch road "through the townships of York and Vaughan, commencing at the line of the township of King between the 8th and 9th concessions, and following the public highway laid out and known as the King road to the township of York, so as to intersect the Albion road at some point between its commencement in rear of lot No. 12 in the 5th concession and Conatt's corner in concession A., in the township of Etobicoke," authorises the company "upon the completion of such road or roads, to erect toll-bars and collect tolls *in the manner hereinbefore* by this act provided for *that or similar* purposes."

Questions were raised during the argument, whether, under this latter clause, the company could collect tolls on the branch road last mentioned, which was conceded to be the one referred to in the conviction, before the whole was completed, or before at least three miles, "commencing at the line of the township of King," &c., were finished.

DRAPER, J.—It may be difficult really to ascertain the true construction of the statute on these points, for its provisions are not at first view consistent with one another, nor does its whole frame indicate the work of a careful or experienced draftsman. But the facts are not brought before the court in such a manner as to call for or indeed to afford material for adjudicating these questions; and the conviction is clearly bad on other grounds.

The statute gives no power of conviction, and therefore the present one must be upheld under the statute of U. C. 2 Will. IV., ch. 4, if it can be sustained at all. It is only necessary to refer to that statute in order to see that this omits many important particulars: 1st. Any statement of the information. 2ndly. The summons and appearance or default of the accused. 3rdly. His plea denying or confessing. 4thly. The evidence.

The offence of which Haystead is convicted is stated to be, that he did “evade payment of toll at the toll-gate situate on the Vaughan branch of the Albion planked road.” It does not appear that any toll was claimed, or what toll, or how imposed, or that any could be claimed or imposed by reason of the completion of the road, or of any part of it. The offence meant to be charged was, I assume, that provided for by the 20th section; but if so, it is most incorrectly stated, for it does not appear by the conviction that he had proceeded on the road with *any carriage or animal liable to pay toll*, and after turning out of the road had returned to or re-entered it, with such carriage or animal, beyond a toll-gate, without paying toll, whereby payment was evaded. These defects are, in my opinion, fatal, and the conviction must therefore be quashed.

The counsel for the defendant stated that the parties were very anxious to obtain the opinion of the court as to the power of the company to impose tolls for travelling on the branch road under the circumstances stated. I have not felt it necessary to make up my mind finally on this question; but for the present confine myself to stating, that the strong inclination of my mind is, that tolls on the branch road can only be collected when the road is made, accord-

ing to the requisition contained in the 33rd section of the statute.

Per Cur.—Conviction quashed.

CORBETT, SHERIFF, v. SMITH & HENDERSON, &c.

Attornies—compelled on application by sheriff under an instrument given to him by them—to sign a bond of indemnity, or pay damages sustained by sheriff in selling under their writ.

The court ordered—upon an application by the sheriff—that A. & B., attornies, &c., should, upon the following paper having been given by them to the sheriff—

Q. B.

“ *Wilson et al. v. Hastings.*

“ The plaintiffs will indemnify the sheriff on selling good of Hastings’ under ven. ex.

(Signed)

SMITH & HENDERSON,
Attornies for the Plaintiff.

Kingston, February 24, 1847.

enter into by a day named, or procure two sufficient parties to enter into a bond of indemnity to the sheriff, to be dated the 4th of March, 1847, with the usual conditions to indemnify according to the facts as they existed at that date, the parties, &c., to be approved of by the master ; otherwise, that A. & B. should pay to the sheriff the damages, &c. (see order in full), he had sustained by reason of selling *Hastings’* goods under the writ of *vend. ex.*

The court also held that the conduct of the sheriff affecting his right to recover, either in whole or in part, on the bond, could not be urged as a reason for refusing his application to obtain the bond of indemnity, but must be left as a matter of defence to, or mitigation of damages, in a suit to be brought by the sheriff on the bond.

A rule was obtained by the sheriff—the defendant in the suit of *Hunter v. Corbett* (previously reported), calling upon Messrs. Smith and Henderson to shew cause why they should not indemnify the sheriff from all loss for selling certain goods as the goods of Thomas Warren Hastings, at the suit of *Wilson & Kyle*, pursuant to an undertaking given by them ; or why they should not procure and deliver to the sheriff a sufficient bond from *Wilson and Kyle*, or other sufficient security for indemnifying the said sheriff according to that undertaking ; or why they should not pay to the sheriff the amount of the loss or damage sustained by him by reason of selling the said goods under the said undertaking ; and why it should not be referred to the master to compute the amount thereof.

Hastings kept an Inn in Kingston, called the Lambton House. He became embarrassed, and on the 8th Sept., 1846, a writ of *fi. fa.*, against his good, was placed in the sheriff’s hands, in a cause of *Cartwright v. Hastings*, for

154*l.* 12*s.* 8*d.* On the 24th September, 1846, a *fi. fa.* against his goods was also placed in the sheriff's hands, in a cause of Wilson & Kyle v. Hastings, for 137*l.* 10*s.* 9*d.* By virtue of these writs the sheriff seized all the household furniture and other effects in the Lambton House, and returned to these writs that he had levied to the respective amounts; but the goods remained on hand for want of buyers. On the 29th January, 1847, the sheriff received a *venditioni exponas* in the first mentioned cause, and on the 8th February following, a similar writ in the second cause. On the 4th of the same month of February, he also received a *fi. fa.* against Hastings' goods, at the suit of Rossin and Rossin, for 22*l.* 17*s.* 9*d.*, and about the same time, received notice that 123*l.* 9*s.* was due, and in arrear, for rent of the Lambton House, which claim was afterwards reduced to 103*l.* 18*s.* 7*d.* At the time of sale these various demands with interest, costs, fees, &c., amounted to 428*l.* 4*s.*, to which were to be added the sheriff's fee, 11*l.* 1*s.* 2*d.*, besides disbursements. After the receipt of these latter writs, the sheriff was notified of the claim of George Hunter, to a considerable portion of these goods so levied on. He gave immediate notice to the attornies for the plaintiffs, and then to Smith and Henderson as attornies for Wilson & Kyle, announcing his intention to apply for leave to amend his return of goods on hand, and to return *nulla bona* as to Hunter's claim, amounting to about 212*l.* The plaintiff's attorney in Cartwright v. Hastings, and Smith & Henderson as attornies for Wilson and Kyle, stated their readiness to indemnify; and Mr. Henderson signed and gave to the sheriff a paper, in the words following:—

“ Q. B.”

“ *Wilson et al. v. Hastings.*”

“ The plaintiffs will indemnify the sheriff in selling goods of Hasting under *ven. ex.*

(Signed)

“ SMITH & HENDERSON,

“ *Attornies for Plaintiffs.*

“ Kingston, Feb. 24, 1847.”

After this, all the goods seized, including those claimed by Hunter, were sold under the different writs, as being the

goods of Hastings. The sheriff's affidavits stating that none of the parties, at that time, made any difference with respect to those claimed by Hunter, whose claim was apparently treated by all those parties as fraudulent, and that the indemnity was "specifically against said George Hunter's claim." It also appeared that the sheriff got a bond to indemnify in the suit of Rossin v. Hastings. The sale was commenced with an expectation that the rent, and these different demands, would absorb the proceeds of all the goods; but also with the assent of the assignee of Hastings, who had in the meantime become bankrupt, to sell any surplus. After the sale, the execution in Cartwright v. Hastings, was entirely abandoned as void under the Bankrupt Law; and thereupon the sheriff paid over to Hastings' assignee, 192*l.* 3*s.*, the surplus in his hands after satisfying the executions of Wilson & Kyle, and of Rossin & Rossin, and the claim for rent. The amount of Wilson and Kyle's execution was paid by a promissory note of 90 days, given on 4th March, 1847, before the writ in favour of Cartwright was abandoned; which note the sheriff paid.

The sheriff put the writ served on him, in behalf of Hunter, into the hands of Smith & Henderson, to defend, as he swears, not on his own account, but on behalf of the parties indemnifying him. He has since been forced to pay 27*l.* 10*s.* 7*d.*, the costs of putting off the trial on one occasion, and 301*l.* 1*s.* 1*d.*, the judgment recovered against him by Hunter, with interest and costs. He swears that although he has been assured by Mr. Henderson that Wilson would repay him—they all, Wilson, Smith & Henderson, notwithstanding repeated applications, refuse to do anything whatever for his indemnity, either alone or conjointly with the other parties who indemnified.

In reply, Mr. Henderson's affidavit states, that he gave the undertaking set forth, not as against Henderson's claim only, but against any other claim on the goods of Hastings, understanding that there was another, and deriving all his knowledge as to both claims, and the supposed invalidity of Hunter's claim, from the sheriff. He denies having been informed by the sheriff of any intention on his part to amend

his return to the *fi. fa.* He states that when he gave this memorandum, he was ignorant his client Wilson had given the sheriff any instructions not to sell the goods claimed by Hunter ; but believes, that but for the conduct and manner adopted by the sheriff in selling these goods, Wilson would have made no difficulty in the matter. He suggests these circumstances, and the fact that the sheriff paid over to the assignee of Hastings a large surplus which might have gone to satisfy Hunter's claim, as a reason for Wilson's resisting the sheriff's claim. He denies all idea of rendering himself liable to the sheriff by the memorandum he signed ; and says he supposed, and even understood from the sheriff, that he meant to sue Wilson, and that Wilson authorized him to give the memorandum which he signed.

Mr. Smith, in his affidavit, denies that he was at the time, nor till long after, aware of the memorandum having been given, nor did the sheriff profess to hold him liable until this application says—he says has been informed, and verily believes, that Wilson gave notice to the sheriff not to sell the goods claimed by Hunter until the other goods were exhausted—in order to sue if they were not sufficient. That if the sheriff had acted with common prudence in selling, or had not paid the surplus to the assignee, without first taking an indemnity, he would have sustained no loss whatever. Mr. Wilson, one of the execution creditors of Hastings, also makes an affidavit, in which he states, that he heard of Hunter's claim, but as there was more than sufficient to pay him, he gave the sheriff notice, before the sale, not to sell the goods claimed by Hunter, and requested the sheriff to set aside the goods claimed by Hunter apart, and sell the residue first, in order to see if enough could not be so realized, which the sheriff refused to do ; and he swears that there was sufficient to satisfy all the executions without selling the goods claimed by Hunter. There is also an affidavit of William McMillan, who says, he was employed as auctioneer by the sheriff, to conduct the sale ; that the sheriff stated that he had received notice of rent in arrears, and a distress warrant to levy it ; and that he advised the sheriff not to sell the goods claimed by Hunter,

under the execution, but to set these goods apart, and sell them for the rent ; but the sheriff refused, alleging that it would be too much trouble ; that the amount of the sale was 508*l.* 3*s.* 1*d.*, and the amount sold beyond those claimed by Hunter, was 364*l.* 1*s.* 9½*d.* ; so that those claimed by Hunter were sold for 144*l.* 3*s.* 1½*d.*

DRAPER, J.—The giving the undertaking to indemnify the sheriff, by Mr. Henderson, in the names of himself and his co-partner Mr. Smith, as attornies for the plaintiffs, in the suit of Wilson et al. v. Hastings, is clearly established ; and that it was intended to apply to all the goods then in Hastings' possession, or more correctly speaking, in the sheriff's possession under the two *fi. fas.* which he had returned, "goods on hand." Mr. Henderson further states, that he gave this undertaking by Wilson's authority, a point upon which Mr. Wilson's affidavit is entirely silent. And the only material fact which is stated as happening before the sale, is the notice given by Wilson to the sheriff not to sell the goods claimed by Hunter till after selling the others ; whether this was given with the knowledge of the undertaking signed by Smith & Henderson, is not stated, but I infer it must have been with such knowledge, otherwise there appears no motive for Mr. Wilson's interference in the matter, and this interference is quite inconsistent with Mr. Henderson's positive statement. As a matter arising, therefore, after the indemnity, it is like many others of the statements, such as the not levying the rent out of the goods claimed by Hunter, and the paying over the surplus to Hastings' assignee—matters of defence to, or of mitigation of damages in a suit to be brought by the sheriff.

From the affidavits on both sides, it is obvious that there may be in such a suit questions of law and fact raised, materially affecting the sheriff's right to recover, and which cannot be properly considered on this summary application. I think the sheriff ought to be placed in the same situation as if a proper bond of indemnity had been executed to him ; such a bond as would have been entered into on the 4th March, 1847. If the plaintiffs, whose attornies Smith & Henderson were, will not execute such a bond, then the

attornies who give the undertaking ought to give the security in proper form. In an action on such bond, it will be open to them to set up any defence which the facts which have happened since the 4th March, 1847, will sustain.— 1 Dowl. 61, 415, 469, 512; 2 Dowl. 161; 1 Cr. & J. 374; 13 M. & W. 28; 1 C. & M. 714; 1 B. & C. 162.

The order of the court, therefore, will be, that upon Messrs. Smith & Henderson entering into, or procuring two sufficient parties to enter into a bond to the sheriff, in a penalty double the amount endorsed, to be levied on the writ of *ven. ex.*, in the suit Wilson et al. v. Hastings, to be dated the 4th March, 1847, with the usual condition to indemnify according to the facts, as they existed at that date, such bond and condition, and the sufficiency of the parties (if not executed by Smith and Henderson,) to be submitted to the master for his approval, and after such approval, to be executed and delivered to the said sheriff, on or before the first day of April next; then this rule to be discharged—otherwise, that the rule be made absolute; that Messrs. Smith and Henderson do pay to the sheriff such sums as the master shall ascertain to have been paid by the sheriff to the plaintiffs in the suit of Wilson et al. v. Hastings, with interest from the time of payment, and such proportion of the costs to which the sheriff has been put in defending the action brought against him, by the said George Hunter, as the master shall think just, in reference to the other parties indemnifying, and the amount of their claims, together with the costs of this application.

Per Cur.—Rule absolute on terms above mentioned.

QUEEN'S BENCH,

TRINITY TERM, 1849.

(Continued.)

GEORGE HOBSON v. THE WELLINGTON DISTRICT MUTUAL FIRE INSURANCE COMPANY.

Taking exceptions to declaration upon demurrer to plea.

After judgment has been once given on the record against the defendant upon demurrer to his pleas, and he has been allowed to add another plea, which, when demurred to, he abandons—*Held per Cur.*, that he cannot be allowed on this second demurrer to take exceptions to the declaration—the court having already adjudged it to be good.

In this case the question that came up for the decision of the court, was, can a defendant after the court *has given judgment* against his pleas, without any exception being made by him to the declaration, and after he had been allowed by the court to add another plea which was demurred to, and which he admitted to be bad, take upon this second demurrer an exception to the declaration previously held by the court on the first demurrer to be good.

ROBINSON, C. J., delivered the judgment of the court.

We think the defendant cannot, on the argument of this demurrer to the 8th plea, take exception to the declaration.

In the present term the court has given judgment for the plaintiff upon demurrer to two other pleas in this same action; and that judgment involves the opinion of the court, that the declaration is sufficient in substance. If we should determine otherwise upon a demurrer to this other plea which has been amended, there would be inconsistent judgments on the record.

Upon the argument of the demurrer to the other pleas, the defendant had not given notice of any such exception, and according to the practice, the court declined to entertain it.

The plaintiff, therefore, has judgment in his favour on the record, and we think the course of the court, as sustained in the case of *Creswell v. Packham*, 6 Taunton, 650, disables him from impeaching the declaration now,

The plea is given up, and the plaintiff therefore must have judgment.

Pet Cur.—Judgment for plaintiff on demurrer.

LUCAS V. PEATMAN.

Repassing or resealing record—verdict set aside.

Where the record, after having been made a remanet, had not been *repassed* or *resealed*, and was otherwise before the court in a slovenly state—the court set aside the verdict with costs. They bound themselves, however, to no inflexible rule on the subject of repassing and resealing.

Trespass—plea “not guilty” by statute; verdict for plaintiff 300*l*.

The defendant moves to set aside verdict with costs, on the ground that the record was not passed or re-sealed before the last assizes—or for a new trial on the law and evidence, and for misdirection.

The cause was entered for trial last September, and made a remanet at the last assizes—it was called on and no objection made by the defendant’s attorney or counsel, who was present, till after the jury were sworn. The objection that the record had not been re-sealed or passed was overruled, and the trial proceeded; the defendant’s counsel cross-examined the plaintiff’s witness, and addressed the jury.

The defendant is high bailiff of the town of Brantford. The plaintiff’s goods were seized and sold by him under a warrant for levying a fine and costs for infraction of a bye law of the police.

A notice of action was served, which was irregular in not stating precisely enough the place of abode of the plaintiff’s attorney, being subscribed thus :

Yours, &c.

F. WILKES,

Attorney for the said Andrew Lucas, town of Brantford.

The 41st sec., 10 & 11 vic., ch. 46—the police act for Brantford—required the action to be brought within six months, but gives no other protection. The court, therefore, did not entertain the objection regarding the notice, as no notice need have been given.

ROBINSON, C. J.—We granted the rule on the objection that the record had not been re-sealed, or rather, had not been re-passed. In answer to this objection, it is urged that the defendant raised it too late, the jury being sworn, and that, at any rate, when he afterwards cross-examined witnesses and addressed the jury, he waived the irregularity.

Without entering into a consideration of these points, we think we are bound, for the sake of the propriety and regularity of our proceedings, to set aside this verdict. The record is not a decent one to exhibit to the court, or to have a jury sworn upon, the plaintiff's attorney has altered and re-altered the entries as he pleased, and the record as it stands, has never received the sanction and recognition of the proper officer of the court. Without binding ourselves to any inflexible rule on the subject of re-passing or resealing, we make this rule absolute.

Per Cur.—Rule absolute.

ROBERTSON V. COOLEY ET AL.

Trespass—declaration—demurrer.

A declaration in *trespass* charging the defendant with *having caused* the plaintiff to be assaulted and imprisoned—is good.

Declaration—trespass—in which the defendant was charged with having *caused the plaintiff* to be assaulted and imprisoned.

Demurrer—because the declaration stated a cause of action in case and not in trespass.

Crooks for the demurrer. *Mowatt*, contra. The cases cited were—English v. Purser, 6 E. R. 395; 1 Chitty Pld. 256; Fergusson v. Adams, 5 U. C. R. 294; Hudson v. Nicholson, 5 M. & W. 437; Harvey v. Bridges, 14 M. & W. 437; Wright v. Burrowes, 16 Law Jl. 6 C. P.

ROBINSON, C. J., delivered the judgment of the court.

The ground of demurrer to this declaration, is, that the defendant is charged in trespass with having caused the plaintiff to be assaulted and imprisoned, which it is insisted is not charging him in trespass, but rather in case.

In *Fergusson v. Adams and others*, in this court, 5 U. C. R. 196, we considered that, as all are principles in trespass, a declaration charging that the defendants, with force and arms, caused the plaintiff to be assaulted and imprisoned, stated a good cause of action in trespass.

We have been referred to a recent case in the Queen's Bench, in England, of *Prickett v. Gratrex*, 8 Ad. & Ell. N. S. 1020, in which the same objection was taken, not to the declaration, but to the notice of action. And Lord Denman answered by saying, there is no ground for a distinction between "imprisoned" and "caused to be imprisoned."

Per Cur.—Judgment for the plaintiff on demurrer.

MANNING V. PROCTOR ET AL.

Recognizance of bail—declaration—recognizance remaining in Toronto, sued on in an outer District, and not filed in the district where it was taken.

In debt, on a recognizance of bail, the declaration will be bad if it appears that the plaintiff is bringing his action in an outer district, upon a record of this court remaining in Toronto.

In debt on a recognizance of bail taken in an outer district, the declaration must shew the recognizance to have been filed in *the district where it was taken*.

Declaration—debt on recognizance of bail, in which it appeared that the plaintiff brought his action in the District of Victoria, upon a record of this court remaining in Toronto; and also in which it was not shewn that the recognizance was filed *in the district where it was taken*.

The defendant demurred on those two grounds to the declaration.

Leith, for the demurrer, cited *Gillespie v. Grant*, 3 U. C. R. 400; *Hob.* 196; *Tidd.* 427; 3 *Bing.* 459; 7 *T. R.* 583; *Willes*, 431. *Mowatt*, contra, relied upon *Sutton v. Fenn*, 2 *W. Bl.* 847; *Duncan & Passenger*, 8 *Bing.* 355; *Com. Dig. Pl. C.* 20; *King's Bench Act*, 1822, 13th clause, 8 *Vic.*, ch. 36, sec 2; *Hartley v. Hodgson*, 8 *Taunt* 171.

The defendant is, in our opinion, entitled to judgment on this demurrer to the declaration: 1st. Because the plaintiff has brought his action in the District of Victoria, upon a record of this court remaining here; and 2nd. Because he does not shew the recognizance to have been filed in the district where it was taken, as the statute 2 *Geo.* 4, ch. 1, sec. 40, expressly required, before we can give to it the

effect as if taken in open court; in other words, before it can constitute a maker of record which can acquire any force by being recorded, or which we have authority under the statute to cause to be enrolled as a matter of record.

We consider the case of Gillespie et al. v. Grant, 3 U. C. Rep. 400, as determining this point.

Per Cur.—Judgment for defendant on demurrer.

DORLAND V. BONKER.

Pleadings—argumentative denial in plea of the agreement set out (below) in the declaration.

The declaration set out an agreement made on 27th Nov., to tow the plaintiff's scow from the bay of Quinte, near Adolphustown, to Kingston, and this the defendant undertook to do, *on the next day*, without any qualification or reservation, and not making the performance dependent on any contingency whatever.

The defendant, in the first part of his plea, admitted the agreement to have been such as the plaintiff set out, but afterwards, in the same plea, he averred that the agreement was not so precise and absolute, but was to the effect, that the defendant being at Kingston with his steamer on the 27th November, and intending to return to Belleville on that day, and to come back to Kingston on the next day, agreed that on his return trip, on the next day, he would tow down the plaintiff's scow.

The plaintiff demurred to this plea as amounting to the general issue.

Vankoughnet, for the demurrer. *Phillpotts*, contra. The cases cited were—Dorland v. Bonter, 5 U. C. R.; Guthing v. Lynn, 2 B. & Ad. 232; Pringle v. Mollett 6 W. & W. 80; Hayselden v. Staff, 5 A. E. 153.

ROBINSON, C. J., delivered the judgment of the court.

If the agreement, as the defendant last states it, is no other in effect than that which the plaintiff had declared upon, then our former judgment on demurrer in this case determines that the defendant's boat being frozen in on the night of the 27th Nov., would not relieve him from the consequences of not performing his agreement; if it is

different in effect (as I think it is) from that which the plaintiff declares upon, then the plea is bad as amounting to an argumentative denial of the agreement set out.

It does, no doubt, set up a different agreement; for the defendant, we can see plainly, would desire to set up under it a defence, which would be no defence to the agreement, as the plaintiff sets it out. If the defendant only engaged to tow the scow down on his next return trip, then he could not have broken his engagement till the return trip had taken place; but the agreement, so qualified, is quite different from that declared on.

Per Cur.—Judgment for plaintiff on demurrer.

BRENT, ASSIGNEE OF DRAPER, v. PERRY.

Trover by assignee of bankrupt—pleadings—cognovit given by bankrupt to defendant—when void as against creditors.

In an action of trover by the assignee of a bankrupt against the defendant, the declaration laid the trover and conversion before the bankruptcy. The defendant, after pleading the general issue, justified under a judgment and execution against the bankrupt. The plaintiff replied, that the judgment and execution were fraudulent and void under the bankruptcy laws. The defendant demurred; and the court decided the replication to be well pleaded. It was therefore held, *per Cur.*, that—as the general issue was the only issue on the record at the trial, and as that issue merely went to the fact of the conversion—the defendant could not, in the absence of a special plea, be let into a justification under his execution.

A cognovit, given in the opinion of a jury, by a bankrupt in contemplation of bankruptcy, and for the purpose of giving to the defendant a preference or priority over his (the bankrupt's), general creditors—is a *security* within the 19th clause of the Bankrupt Law, and therefore void.

The plaintiff declared in trover as assignee of Chester Draper, a bankrupt.

The 1st count laid the conversion after the bankruptcy of goods of the bankrupt, which had come into possession of the defendant before the bankruptcy, and which he, knowing them to be the bankrupt's goods, and to be the goods of the plaintiff after the bankruptcy, refused to deliver them up to the plaintiff after the bankruptcy, and converted them to his own use.

The 2nd count was for conversion of some promissory notes, and was out of the case, a *nolle prosequi* having been entered upon it.

The 3rd count laid the possession of the goods to have

been in the plaintiff after the bankruptcy, and that the defendant converted them, knowing them to be the plaintiff's goods.

The 4th count laid the trover and conversion all before the bankruptcy. Pleas—"not guilty" to 1st, 2nd, 3rd and 4th counts.

To the 2nd and 3rd counts—that the plaintiff was not possessed as assignee *modo et forma*, &c.

To 3rd and 4th counts—the defendant justified under a judgment entered against Draper, at the defendant's suit, on the 16th of July, 1847, before his bankruptcy for 2,003*l.* 9*s.* 8*d.*, and an alias *fi. fa.* taken out on the same day, under which the sheriff, before the bankruptcy, viz., 12th October, 1847, seized and sold the goods at the request of the defendant. The plaintiff replied to the last plea, that the judgment pleaded was upon confession given by Draper in contemplation of bankruptcy, and for the purpose of giving the defendant, then being a creditor amongst others of the said Draper, a preference, and with the intent to delay and defeat the other creditors of the said Draper.

The defendant demurred to this replication, and it has been adjudged to be a good replication.

The jury found for the plaintiff on the issues, and damages were assessed at 394*l.*, on the whole record.

Crooks obtained a rule for a new trial upon the law and evidence, and for misdirection, and cited 7 C. & P. 347; 12 Jurist, 580.

Hagarty and *Hector* shewed cause; they cited 2 P. & D. 640; 1 M. & Sel. 338; 1 Dowl. N. S. 778; 12 M. & W. 112; 7 M. & W. 358; 2 Scott, 656; 5 Scott, N. R. 880; 12 Moore, 96; 8 Co. 66; 11 M. & W. 272; 1 L. & L. 636; 1 Smith, L. C. 220; 2 U. C. R. 530; 4 U. C. R. 552; 5 U. C. R. 130; 11 Jurist, 287; 1 K. & R. 449; 4 B. & Al. 382; 5 Bing. 177; 2 Scott, 370; 4 Scott, 127; 7 M. & W. 353; 3 Scott, 229; 3 B. & P. 237.

The facts of the case appear at length in the judgment of the court.

ROBINSON, C. J., delivered the judgment of the court.

After the former trial of this cause, we set aside the

verdict, because the declaration charged a conversion of the goods after the title of the assignee had accrued, and the evidence appeared to establish a conversion while they were still in the possession of the bankrupt; thereby shewing that the right of action was originally in the bankrupt himself, in respect to which the assignee should have sued, &c., not as for a conversion after the assignment.

The plaintiff was allowed to amend his declaration, and added the 3rd & 4th counts.

The first count we have already held is not suited to the case, laying, as it does, the conversion to have taken place in the time of the assignee.

The third count is in effect the same, and the only question therefore is, whether the evidence shewed a right to recover under the 4th count, which alleges the possession, loss, and the conversion to have been all in the time of the bankrupt. The defendant had caused the goods in question to be sold as Draper's goods, under an execution taken out on a judgment in his favour against Draper, which judgment was founded on a cognovit given by Draper in July 1847, the commission of bankruptcy not having issued till the 19th November following. The plaintiff contended against this judgment as being fraudulent under the bankrupt laws.

The learned judge at the trial, in consequence of exceptions which were insisted upon by the defendant's counsel, put it to the jury to find specifically—first, whether in their opinion the bankrupt Draper gave the cognovit in contemplation of bankruptcy, and for the purpose of giving the defendant a preference over the other creditors of Draper; secondly, whether Draper had willingly and fraudulently procured his goods to be taken in execution; and, thirdly, whether the defendant Perry knew at the time of levying the execution of any act of bankruptcy before then committed. The jury found on all three points in favour of the plaintiffs. The rule nisi which has been obtained calls in question the consistency of this finding with the evidence; but the first thing to be considered is, that the plaintiffs' case upon the fourth count is opposed only by the general

issue denying the conversion ; for the special plea of justification under the *fi. fa.* in the suit against Draper was met by a replication, which the court has adjudged to be a sufficient answer to it, and which averred the execution and judgment to be fraudulent and void under the bankrupt laws.

Now, undoubtedly the fact of conversion of the goods of Draper by the defendant was proved, for it was shewn that about the 12th October, 1846, the sheriff, by the defendant's direction, or rather for his benefit and at his instance, seized Draper's goods, which the defendant himself purchased afterwards at the sheriff's sale.

Under the new rules, in an action for converting the plaintiff's goods (or, which is the same thing in a case like this, the goods of another person, to whose property and rights of action the plaintiff has succeeded), the general issue operates only as a denial of the conversion, and not of the plaintiff's title to the goods. Matters in confession and avoidance must be pleaded specially.

I do not, therefore, see the object of going into the consideration of the sufficiency of the evidence to support that which the defendant by his demurrer has admitted, as it respects one of his pleas to the 4th count, and which could not legally come in question under the other plea.

The case seems to me to stand quite clear upon the 4th count, for the evidence shewed the seizure to be long before either the commission or assignment, and so brings the case under that count to which the general issue is now the only answer, and that does not let the defendant into a justification under the *fi. fa.*

If, however, it were open to the defendant under the pleadings to rely upon his judgment and execution, we think the finding of the jury upon the points submitted was sustained, and the case clearly with the plaintiff upon the merits.

The evidence at the trial consisted of the deposition made by the defendant himself on his examination before the judge in bankruptcy. It is evident from the course taken in the examination that some of the questions put to the

defendant were prompted by a suspicion that Perry, under the new arrangement, became in fact partner with Draper ; and that the alleged sale of goods made by him to Draper was only a contrivance to enable him, in case the business should prove unproductive, to save any remaining stock of goods, or rather their value, by coming in as execution creditor, leaving the creditors, who would on that supposition be the creditors of the firm, unsatisfied. The defendant's deposition does not by any means admit this to have been the case, but denies it, perhaps not quite satisfactorily and explicitly, and so as to remove doubts from the minds of the jury. It was at least clear, that having, according to his own account, a demand against Draper for a large sum, an arrangement was made apparently without any urgent pressure on the defendant's part, and which had indeed much the look of a voluntary movement on the part of Draper, by which the power was put into the defendant's hands of taking out an immediate execution, which however should not be acted upon to the interruption of Draper's business, but merely kept alive, so that while others were dealing with him, relying upon his apparent solvency, the defendant should be ready at any time, when circumstances might seem suspicious, to come down with his execution and sweep off everything ; in other words, might stand always ready, if Draper should be in failing circumstances, to step in and prevent that equitable distribution of his effects among all his creditors which it is the object of the bankrupt laws to enforce.

I have no doubt that the *cognovit* given under such circumstances and upon such an understanding was a security within the 9th clause of our Bankrupt Law. The jury has found expressly that such security was given by Draper, a trader, in contemplation of bankruptcy, and for the purpose of giving to this defendant a preference or priority over his general creditors ; and I think the evidence fully warranted such a finding.

The jury had to consider that Draper had been recently in business with McCuaig, and had contracted debts still unpaid when he and his partner dissolved partner-

ship in December, 1846 ; the apparent willingness to place this defendant on a vantage ground as to his claim upon him ; the means which the defendant had of acquiring an intimate knowledge of Draper's affairs ; his evident impression in July, 1849, of the necessity of precautionary measures, and Draper's own declaration of indebtedness in September following, arising, not apparently from anything recent, but from a condition of things which both were able to judge of in July, 1847.

Looking at these things together, the jury were satisfied that the security was given in July, 1847, by Draper in contemplation of bankruptcy, and with a view of giving a preference to this one creditor. The question was one purely for them to judge of, and we certainly cannot take upon ourselves to say that the conclusion was opposed to the evidence.

I only advert to the facts of the case for the purpose of shewing my impression, that if the defendant's special plea had remained upon the record for trial upon an issue such as the replication tendered upon it, and the jury had found as they have done, we should not have set aside the verdict, still less can we interfere when the defendant is not in a situation, for want of a special plea, to justify under the *fi. fa.*

If Draper had not become bankrupt, and were himself suing Perry in trover for these goods, the latter could not defend himself under the general issue, by shewing that he took the goods by sale from the sheriff under legal process ; and no more then can the defendant, without pleading it, justify under legal process in an action brought by the assignees, who represent the property and rights of action of the bankrupt.

Then we must consider that the defendant did plead to the 4th count a special justification, as he was bound to do under the judgment and writ, and that that justification was met by a replication that the execution was fraudulent under the bankrupt laws, which replication was adjudged well pleaded, though the defendant demurred to it, thereby admitting its truth in point of fact ; and it would be a strange

state of things if he could afterwards have advantage of the execution and judgment as a defence to the same count under the general issue.

It is of no consequence to enquire whether the facts of this case, as they are presented by the evidence on the last trial, would shew a conversion of which the bankrupt could have complained before the bankruptcy as a tort *done* to him, in which case the right of action accruing to him would devolve on the assignees, and bring the case under the 4th count of the declaration; or whether, the act being one of which he could not complain, the assignees were first entitled to complain of it, because, in either case, there is a count that would suit the cause of action, and because, at any rate, the general issue alone being pleaded in answer to the 4th count, and the goods having once been Draper's and converted in his time, the right of action under the 4th count is clear.

Per Cur.—Rule discharged.

KIRKENDALL V. THOMAS, SHERIFF.

Sheriff—taking insufficient replevin bonds—pleas.

To an action against a sheriff for taking insufficient replevin bonds—he pleaded that the goods replevied were worth more than 15*l.*, and that so the writ of replevin, being sued out of the District Court, was void: *Held per Cur.*—Plea bad.

A release by the plaintiff to one of several obligees in a replevin bond to the sheriff, after assignment to the plaintiff, releases all—and releasing the sureties, the plaintiff has no right of action against the sheriff for taking insufficient sureties.

In this case the sheriff defended himself against the plaintiff's action for taking insufficient replevin bonds, by pleading that the goods replevied were worth more than 15*l.*, and that so the writ of replevin, being sued out of the District Court, was void; and also, by pleading a release to one of the sureties by plaintiff after assignment.

ROBINSON, C. J., delivered the judgment of the court.

The 7th clause of 4 Wm. IV. ch. 7, provides, that when the value of the goods distrained shall not exceed 15*l.*, the writ of replevin may issue from the District Court; according to the plea, therefore, this is not a case within that clause, and the district court would have no authority to issue the writ. But the plea does not aver that the goods

were appraised at more than 15*l.*, and we must suppose that the sheriff before he took his bond had them appraised as the statute 11 Geo. II., ch. 19, sec. 23, requires, and it does not lie in the sheriff's mouth to question the correctness of the appraisement made under his own direction and authority.

The 5th plea we consider good, for the effect of releasing one is the same as if he had released all the obligees, and having thus disabled himself from taking any recourse against them, how can he have suffered any damage from their circumstances being indifferent? And how can he turn upon the sheriff after he has required him to assign the bond, and then released those who are the sheriff's sureties, and against whom the sheriff could have had his remedy not merely now but at any future period?

Per Cur.—Judgment for the plaintiff on 4th plea, and for the defendant on the 5th plea.

M'CLELLAND AND WIFE V. MEGGATT ET AL.

Dower—Statute of Limitations—when it begins to run.

The right to dower being only an inchoate right during the life time of the husband, the statute of limitations does not begin to run till the husband's death.

Declaration—Dower.

3d plea—That John, formerly husband of the said Mary, was not seised of land at any time within twenty years before the commencement of this suit, &c.—concluding to the country.

4th plea—Same as above, with a verification.

5th plea—That neither the said John, nor those whose estate he had in his lifetime are, nor was any or either of them at any time within twenty years next before the commencement of this suit in the possession, or in the receipt of the rent and profits of the said last mentioned one hundred acres of land, &c. and that this suit was not brought within twenty years next after the right of entry or action in the said land first accrued to the said John. Verification.

Demurrer to 3d, 4th, and 5th pleas, because no bar to the action.

Jarvis for the demurrer. *Freeman* contra.

ROBINSON, C. J., delivered the judgment of the court.

These pleas are all clearly bad, we think, for they do not set up any legal defence. To uphold any one of them as a bar to the plaintiff's recovery, would amount to declaring that whenever the husband, being seised during coverture, should alienate the estate, and survive more than twenty years afterwards, the widow would then be too late to claim her dower.

The Statute of Limitations does not in any case begin to run till a right to a remedy has accrued, and the right to dower is only inchoate while the husband lives.

The provision in the 14th clause of our stat. 4 Wm. IV. ch. 1. has no application, except where the husband had no estate in possession, but only a right of entry or action.

Per Cur.—Judgment for the plaintiff on demurrer.

LEONARD V. ATCHESON ET AL.

The note of one of two joint debtors is no satisfaction of the debt. Where therefore A. and B. being sued in assumpsit as jointly liable on the common counts—A. pleaded, as to 20*l.* of the demand, that B., before action brought, for himself and A. made his note to the plaintiff for 20*l.*, which the plaintiff then received and accepted for the 20*l.* and *in payment thereof*; and added, that the plaintiff afterwards endorsed this note given to him by B. to persons unknown, who were still the holders thereof, and entitled to sue B. thereon: *Held per Cur.*,—Plea bad.

The plea was also held bad as being double—and showing a note not negotiable, to make B. liable to a third party.

The defendants Atcheson and Moore were sued in assumpsit, as jointly liable on the common counts.

Moore pleaded as to 20*l.* of the demand, that Atcheson, before this action brought, for himself and Moore, made his note to the plaintiff for 20*l.* payable in ninety days, which the plaintiff then received and accepted *for and on account* of the said 20*l.* and *in payment thereof*; and he added in his plea, that the plaintiff afterwards endorsed this note *given by him to Atcheson* to persons unknown, who were still the holders thereof, and entitled to sue Atcheson thereon. Demurrer to plea.

McLean for the demurrer. *J. Duggan*, contra.

Cases cited—James v. Williams, 13 M. & W. 828; Plumley v. Westley, 2 Scott, 423; Lewis v. Lyster, 2 Cr. M. & R.

704 ; Price v. Price, 16 M. & W. 232 ; Simeon v. Loyd, 3 Dowl. 813.

ROBINSON, C. J., delivered the judgment of the court.

This plea is clearly bad ; for the note of one of two joint tenants can be no satisfaction for the debt ; and if it were, then the delivery of it in satisfaction would of itself be a complete defence—and the plea would be double, for setting up a further defence that Atcheson has been made liable to some one else for the 20*l.* by the plaintiff's act.

And so far as regards any defence that could arise from Atcheson's note being endorsed away to a third party to whom he is thus made liable, the plea must be bad, because the note as set out in the plea is not negotiable, and could not be transferred so as to make Atcheson liable to any other party upon it.

Per. Cur.—Judgment for the plaintiff on demurrer.

THE BANK OF BRITISH NORTH AMERICA V. AINLEY.

Promissory note—pleading—demurrer to replication traversing endorsement.

Declaration—endorsee against endorser of a note, averring an endorsement from defendant to plaintiff. Plea—that plaintiff endorsed to one A. B. who was still the holder. Replication—traversing the endorsement to A. B. Demurrer to replication. *Held per Cur.*, replication *bad*, in not denying that A. B. was the holder of the note at the time of bringing the action.

Declaration—Endorsee against endorser of a note—averring endorsement from defendant to plaintiffs.

Plea—That Plaintiffs endorsed to one A. B., who was still the holder.

Replication—Traversing the endorsement to A. B.

Demurrer to replication—Because it traversed an immaterial fact.

Hagarty for the demurrer : He cited *Fraser v. Welsh*, 8 M. & W., 629 ; *Schild v. Kilpin*, 673 ; 12 Jurist, 246 ; *Arthur v. Beales*, Exch. R., 608.

Richards contra,—who cited *Kemp v. Watt*, 15 M. & W., 672 ; 1 U. C. R., 178 ; *Bartlett v. Benson*, 14 M. & W., 733 ; *Herbert v. Sayer*, 5 Q. B. R., 971.

ROBINSON, C. J., delivered the judgment of the court.

We have had some doubt about the sufficiency of the replication in this case, but are of opinion that the case of

Fraser v. Welsh, 8 M. & W., 629, in which this question of pleading is most discussed, requires us to hold that the plaintiff should not have contented himself with merely denying the endorsement, but should have traversed what was really the material allegation, that Smart was the holder of the bill at the time of bringing the action—or rather, he should have answered the plea by affirming that he was himself the holder at the commencement of this suit, traversing specially the defendant's allegation that Smart was the holder.

In Morton v. Thompson in this court, 1 U. C. R. 178. the fact of another person than the plaintiff being the holder was not in fact traversed, from a blunder made in the language of the replication, though it was meant to be traversed, and we therefore held the replication to be bad; and it was my impression in that case also that the replication ought to have denied the fact of indorsement over by the plaintiff set out in the defendant's plea.

The language of the Court of Exchequer in Bartlett v. Benson, 14 M. & W. 733, goes far, as I still think, to show that where the plaintiff does that, and does no more, he should be held as sufficiently answering the defendant's plea—because, as the judges say in that case, he displaces the title which the defendant has averred to be vested in another person, and we are not to imagine that any other state of facts may have existed which would be equivalent to that pleaded. But the current of authority, I think, makes it clearly necessary that the plaintiff, in answer to such a plea as has been pleaded in this case, should affirm that the plaintiff was the holder when he brought his action, and should traverse that the person stated in the plea to have been the holder was in fact the holder.

Denying merely that the plaintiff indorsed the note to Smart as the defendant has alleged, will not, it seems, suffice, and we must therefore give judgment for the defendant in the three cases on all the demurrers.

Per Cur.—Judgment for the defendant on the demurrer.

RIDOUT ET AL. V. MANNING ET AL.

Statute 12 Vic., ch. 22—Presentment of notes to maker, &c.—The application of the statute to Upper Canada.

The statute 12 Vic., ch. 22, respecting presentment to the makers of notes and inland bills of exchange, &c. &c., does not apply to Upper Canada.

Special case. The following was the note on which action brought :

“ *Toronto, 1st August, 1849.*

“ 82*l.* 18*s.* 5*d.*

“ Twelve months after date, I promise to pay Richard Kneeshaw, or order, at the office of Ridout Brothers & Co., eighty-two pounds, eighteen shillings and five pence, currency, for value received.

(Signed) ALEX. MANNING.”

It had matured since the 12 Victoria, ch. 22.

The note was presented on the afternoon of the third day of grace, 4th of August, 1849, at the office of the plaintiff; and was not presented to the maker personally, or at his place of business or residence; payment was refused, and the note was protested for non-payment.

On the third day next after the day on which the note was protested, notice of protest for non-payment was made, by depositing the same in the proper post-office, properly directed to the endorser, but not pre-paid. No other notice was given.

The endorser contended that the presentment and notice were both insufficient; that presentment should have been to the maker personally; and that notice was too late, and was bad, not being *pre-paid*.

The maker contended he was entitled to a presentment personally, or at his place of business or residence.

The question for the court was, whether on these facts the defendants, or either of them, was liable. If the court should be of opinion that the plaintiffs could so recover, then judgment for the plaintiffs to be entered as by confession, or *nil dicit* against both or either of the defendants for amount of note and interest. If the plaintiffs were not entitled to recover against both or either of defendants, then

a nonsuit to be entered as to both, or to whichever defendant the court might order.

P. M. Vankoughnet for the plaintiffs. He cited the various clauses of the act 12 Vic., ch. 22; *Gibb v. Mather*, 8 Bing. 214; *Boydell v. Hackness*, 3 C. B. 168; *Wilmot v. Williams*, 7 M. & G. 1017; *Halstead v. Skelton*, 5 Q. B. R. 85; 11 Jurist, 157; *The Sussex Peerage*, 11 C. & F. 86.

Hagarty for the defendants. He cited *Rex v. Inhabitants of Everdon*, 9 E. R. 105; *Chitty's Pl.* 59; *Rea v. Cowle*, 2 Burr. 853; *Taylor's U. C. R.* 185; *Jones v. Smart*, 1 T. R. 53. He also referred particularly to the 20th clause of the act 12 Vic., ch. 22; also to the 9th, 10th, 12th, 19th, 20th, 22nd, 25th, 29th and 30th clauses.

ROBINSON, C. J., delivered the judgment of the court.

A statute was passed in the last session of the Legislature of this province, (12 Vic. c. 22,) entitled "An Act to amend the law regulating inland bills of exchange and promissory notes, and the protesting thereof, and foreign bills in certain cases." By the last section of the act it was appointed to take effect from the first day of August following, which is now past.

By a provision contained in the thirteenth clause it is enacted, that every note payable generally shall be presented to the maker either personally or at his residence or usual place of business; and by the seventh clause it is declared, that every note shall be taken to be payable generally, unless it be expressed in the body thereof that the same is payable at a bank or other place, *only and not otherwise or elsewhere*.

The 16th clause of that act also provides that notice of protest for non-acceptance or non-payment may be given at any time within three days next after the day on which the protest was made.

These provisions vary from the law of Upper Canada, in force at the time of the passing of this act; by which law, though a note made payable at a particular place, without adding "not otherwise or elsewhere," is to be taken as payable generally, yet a presentment at the place so named will be good, and it is not necessary to present it otherwise,

though a presentment personally or in any other manner—such as would suffice if no place had been named—would also be sufficient.

And by the law of Upper Canada notice of non-payment must be given or sent not later than the day after the presentment.

In the case before us, the presentment was made after the 1st of August, at a place where the note in the body of it was made payable without the addition of the words “only, and not otherwise or elsewhere,” and was not made as the seventh clause of the new statute requires.

The written notice of non-payment was not mailed till the third day after presentment; and it was not pre-paid when put into the post office, as the 11th clause of the statute requires.

The plaintiff, it is clear on this statement, cannot recover, for without the aid of that act his notice was sent too late; and if the act applies to this case, he has not complied with the provisions :

1st. In not having prepaid his notice.

2ndly. In not having presented the note as required by the 13th clause. He has neither complied with the law of Upper Canada, as it stood before the 1st of August, nor with the provisions of this new statute, if that has to be taken as applying to Upper Canada. So that the plaintiff's case must fail as regards the indorser.

But it is represented as being very important that an opinion should be given by this court for the guidance of those engaged in commerce, upon the question whether the statute referred to is confined in its operation to Lower Canada, or extends also to Upper Canada.

I am by no means certain whether the framers of the act did or did not intend that it should extend to Upper as well as Lower Canada. If they did so intend their intention has not been consistently pursued. We must form our opinion upon an examination of the act itself.

In my judgment, we should treat it as affecting Lower Canada only, though it is nowhere confined to Lower Canada in express words, and though there may be indications in one or two passages of a contrary intention.

We must look at the whole purview of it, and upon that found our judgment. The evidence, in my opinion, leads most strongly to the conclusion that it was intended to apply only to Lower Canada.

In the title it is called an act to amend the law regulating inland bills, &c. *and foreign bills in certain cases*; then the 30th clause, which applies specially to foreign bills, speaks only of bills drawn abroad upon any person in Lower Canada. Yet that clause is the general clause for regulating all proceedings in regard to presentment, protest, noting, and notice.

It is clear that would leave foreign bills subject to one law for Lower Canada, and to another law for Upper Canada, in almost every particular, if not in every one.

Then the preamble states the expediency of rendering *more uniform* the protesting of bills, and notes, and practice thereon. Now if they meant by that to give a uniform law throughout Canada, they surely would not have confined many of their provisions in regard to these particular points to Lower Canada, as they have done in express terms—for example in the 9th, 19th, 20th, 22nd, and 30th clauses. If they had in these clauses assimilated the law of Lower Canada to that which was in force here, then they would have shown that they meant by the word “uniform” uniform throughout Canada. But we see that these provisions would in these very particulars establish in Lower Canada regulations quite different from those which our law prescribed. I infer, therefore, that they meant only to make the practice uniform in Lower Canada, by giving certain positive rules to be observed by all notaries there.

Then in the first clause they repeal the Lower Canada statute 34 Geo. III., c. 2, because it is inconsistent with the new law, but they leave various statutes in force in Upper Canada which it would be equally proper to repeal if this new statute is to extend to Upper Canada. They make nowhere the slightest allusion to Upper Canada, or to any statute in force there, though they copy many parts of some of those statutes for the purpose, as I infer, only of introducing them into Lower Canada as amendments.

The 9th, 10th and 12th clauses strengthen also my impression, that the statute was not intended to operate out of Lower Canada, particularly the 12th; for otherwise, why should Lower Canada alone be named in that clause? If what is there made law were already the law in Upper Canada, that would not account for their confining that clause to Lower Canada, for the bill contains many provisions not so confined in express terms, and which are taken from the law of Upper Canada, beyond doubt. But this 12th clause would entirely change the law of Upper Canada, if it applied here; it is confined to Lower Canada in terms, and therefore cannot apply here, and the effect, therefore, is quite inconsistent with the supposed intention that the statute is to operate throughout Canada, in order to make the law uniform in both parts of it.

So the 19th and 20th clauses are quite repugnant to the idea that the statute is to apply here; for if so, why should the 19th clause have been in words limited as it is to Lower Canada? Any one who framed that clause with Upper Canada in his mind would know that we had no such enactment in force here, and therefore if he were desirous to repress such offences as are to be punished under that clause, why should not the provision have been general? The 20th clause shews as clearly that the legislature were passing the act for Lower Canada only, for otherwise the effect of that provision would be absurd.

I refer also to the 22nd and 25th, especially the latter, and to the 26th and 31st clause, as all tending strongly to shew that we should hold the statute to be confined to Lower Canada. That it would introduce much confusion and very inconvenient results if it were otherwise construed, was pointed out on the argument, and we should gladly, I think, avail ourselves of the abundance of evidence afforded by the statute that it was not intended to be in force here. The 25th clause would be a strange provision, if we could suppose that this province was intended also to be subject to this law. Neither do I believe that the Legislature could have designed the 26th and 31st clauses to apply here, for the first establishes holidays which are some of them

unknown in Upper Canada, and the last alters the general period of time for the limitation of actions from six years to five. Neither of these, however, would alone be safe to rely upon.

The mention also of *leagues* in the table of fees—a common standard for measurement of distance in Lower Canada, but never adopted with reference to Upper Canada, and the general introduction of the words Lower Canada into most of the forms given in the schedule are additional arguments to lead to the conclusion that this is a statute for Lower Canada only.

It would be easy, if it were necessary, to multiply evidences of that intention, and when we see no clear evidence of an intent to embrace Upper Canada, but so many arguments to the contrary, on the face of the act, we need not hesitate, in my opinion, to declare that the Legislature did not intend to introduce among us the inconvenient consequences which would follow the incorporation of all the clauses of this act into one code, without any reference to existing provisions, and leaving it to each person to reconcile conflicting laws as well as he could.

Per Cur.—Postea to plaintiffs.

MCLEAN V. TINSLEY.

Debt by master on agreement against the husband of apprentice's mother, not a party to agreement—Profert—Penalty—Liquidated damages—Consideration.

In an action of debt as for liquidated damages, on a deed of apprenticeship, by the master against the husband of the mother of the apprentice for a breach of the covenants in the deed by the apprentice—as the plaintiff founds his action on the deed, which must be presumed to be in his possession—the plaintiff should make profert of the deed.

Debt on simple contract does not lie on any collateral or conditional undertaking only.

Where a party binds himself in an agreement to pay the plaintiff 25*l.* if A. B. does not fulfil all the covenants and conditions of the agreement, the 25*l.* must be looked on as a penalty, and not as liquidated damages, giving the plaintiff an action as for an absolute debt.

To support an action of *debt* on a simple contract, it must appear that the contract has been entered into for a *consideration moving to the debtor himself*, and not as in *assumpsit*, for a consideration moving from the plaintiff to a third party.

The declaration stated in substance this case:—that the defendant Tinsley, having before the contract declared upon married Sarah Quinlin the mother of one Walter Quinlin,

a minor, and the plaintiff, who is a mason and plasterer, consented to take Walter Quinlin, then of the age of fourteen years, to serve as an apprentice for five years, an indenture of apprenticeship was entered into, by the plaintiff of the one part and Sarah Tinsley the mother of Walter Quinlin (and then or now the wife of the defendant) and Walter Quinlin of the other part, by which the plaintiff engaged to teach Quinlin the trade; and it was stipulated by Quinlin and his mother that Quinlin should faithfully serve during the five years, and should keep his master's secrets and obey his commands, and should not absent himself during the five years by day or night without his master's consent. That after Quinlin had begun to serve under these articles (to which the defendant was not a party), in consideration of the plaintiff agreeing to pay to the defendant, or to his wife, or to Walter Quinlin 12*l.* 10*s.*, on the latter fulfilling his term of service, and in consideration also of what the plaintiff had engaged by the articles to do and provide for Quinlin, the defendant by agreement in writing bound himself and agreed to pay to the plaintiff 25*l.*, *if the said Walter Quinlin should not fulfil the covenants and conditions of the indenture.*

The plaintiff's cause of action against the defendant was that Walter Quinlin did not fulfil his covenants, but absented himself without the consent of the plaintiff; of which the defendant, it is alleged, had notice.

The declaration was in debt on simple contract, and contained two counts on the agreement differing a little in the mode of setting it out, both averring performance by the plaintiff of all the conditions on his part, and both concluding by claiming the 25*l.* as a debt accruing to the plaintiff under the agreement.

The defendant demurred to both counts, taking a number of exceptions; among others the want of profert of the alleged covenant executed by the apprentice—that debt did not lie on a collateral undertaking such as that declared on—that there was no consideration shown, to make this agreement binding on the defendant.

Bell for the demurrer. *Durand* contra.

The authorities cited were—1 Saund. 9; 5 Bing. 34; 6 Bing. 136; 4 Bing. 470; 3 Nev. and Man., 604; 1 Roll. 594; Hard. 486; Dyer, 272; 2 Vent. 36; Ray. 67; 1 Vent. 293; Cro. Eliz. 194; 3 Lev. 364; Stephens on Pleading, 484; Chitty on Contracts, 499.

ROBINSON, C. J., delivered the judgment of the court.

We think the plaintiff was bound to make profert of the deed, in order that we might see the covenants which the apprentice was to keep. The plaintiff was a party to this deed, and claims directly a benefit under it. It must be presumed therefore to be in his possession, and it is not stated by way of inducement merely, but the action is founded on it.

This is the distinction between the present case and that of *Jevins v. Harridge*, Adr. 1 Saunders, 9. where the plaintiff declared on a bond, not setting out the condition, which was for the performance of covenants in an indenture of lease between the plaintiff and the intestate; and the court said that it was for the defendants to shew the indenture, as they sought to defend themselves against the bond by pleading performance of the covenants.

Here the plaintiff expressly founds his right of action upon the breach by a third party of certain covenants which he refers to, but which he does not shew to the court, as I think he is bound to do.—3 Moo. & P. 609.

But, independently of any objection for the want of profert, we are of opinion that the plaintiff has wholly misconceived his action, for that debt on simple contract does not lie on any collateral and conditional undertaking of this kind.

In Hardress' Reports, 486, it is laid down on the great authority of Lord Hale—"But the great question here is whether or no a debt or duty be hereby raised; for if it be no more than a collateral engagement, order or promise, debt lies, not as in the case of goods delivered by A. to B. at the request of C., which C. promised to pay for, if the other does not, for in that case a debt or duty does not arise between A. and C. but a collateral obligation only."

And it is plain that no absolute debt can be held to have arisen in this case, but only a claim to such damages as a

jury may think fit to give for any absence from service, or other misconduct on the part of the apprentice, which the plaintiff may prove. The plaintiff seems to have brought his action under the idea that he can claim of right the 25*l.* mentioned in the writing, but we think that he cannot, and that that sum must be looked upon as a penalty and not as liquidated damages, and the plaintiff therefore is entitled only to claim damages for the breach of the covenant by Quinlin, and is not entitled to sue for the 25*l.* as an absolute debt.

Then further, as to the objection which has been taken that there is no consideration shown which can make this a contract binding on the defendant—we are of opinion that that is certainly a valid objection, so far at least as it regards this action of debt; for it is a principle of law that to support debt on simple contract, it must appear that the contract has been entered into for a consideration moving to the alleged debtor himself. It will not be sufficient, as in *assumpsit*, to shew a consideration moving from the plaintiff to a third party. I refer to *Com. Digest, Debt B.; Dyer, 272*; which clearly recognize a distinction in this respect between debt and *assumpsit*.

We are all of opinion that the defendant is entitled to judgment on this demurrer for the reasons stated. Whether the facts of the case are such as will support an action against this defendant in any form, appears to me doubtful; but on that point it is not now necessary to express an opinion: and indeed the consideration is so averred as to make it rather doubtful on the record what consideration the plaintiff means to rely upon for supporting his contract. In a case of this kind all that occurred before the instrument declared on was signed by the defendant would constitute a past consideration not in its nature continuing as applied to the defendant, and not such as would support an *assumpsit*. Whether any new consideration, arising after the covenant had been entered into, is sufficiently shewn by the statements in the declaration to support a promise by the defendant if the plaintiff had sued in *assumpsit*, does not seem to be clear.

Per Cur.—Judgment for the defendant.

DOE BAKER V. CLARK.

Church Temporalities' Act, 3 Vic. ch.74, sec. 16—Conveyance—Devise—Codicil—Re-publication of will—Time when a will may be considered as a conveyance executed.

A will is, in contemplation of law, a "conveyance"—under the terms, therefore, of the 16th clause of the 3rd Victoria, chapter 74—viz, "by deed or conveyance"—a person may devise as well as grant by deed lands to the Church of England, for the purposes of that act.

A. makes his will in 1843; in 1846 he adds a codicil to the will, merely appointing a new executor "of his will, written above." *Held, per Cur.*, that the codicil was a confirmation, and not a revocation of the will, and that the will must still be considered as a will made and executed in 1843. *Held also* (McLean, J., dissentiente), that the will, as a conveyance, was perfect at the time of its execution, though its effect could not be felt till the death of the testator; and that therefore the condition of the 16th clause of the act 3 Victoria, chapter 74, requiring "a deed or conveyance to be made and executed six months at least before the death of the persons conveying the same," might be complied with in the case of a will.

A devise, under the statute 3 Victoria, chapter 74, made to the bishop and the rector, is good—notwithstanding the statute speaks of a conveyance to the bishop or rector, &c.

This was an action of trespass and ejectment, for the recovery of town lots numbers 294 and 95, in the town of Kingston, in the Midland District.

The defendant pleaded "not guilty."

The cause came on to be heard before the Chief Justice, at the assizes, Midland District, when a verdict was found for the plaintiff, with damages, subject to the opinion of the court upon the following case:

Henry Baker died on the first day of November, A.D. 1846, seised of the premises in the declaration mentioned, having on the first day of February, A.D. 1843, made his will, containing, amongst others, the following devise:—"I give, devise and bequeath to the Honourable and Right Reverend John Strachan, Doctor of Divinity, Bishop of Toronto, and to the Venerable George O'Kill Stuart, Rector of St. George's Church, of the town of Kingston, and to their successors, being bishop of the diocese and rector of St. George's Church according to the rites and ceremonies of the Church of England, town lots 294 and 95, in the town of Kingston, and forming the corner of Clarence and Bagot streets, now Rear street, at present occupied by Mr. James Fraser as an hotel, in trust; to receive the rents and profits, and apply them to the support and maintenance, and towards the payment of one or more assistant ministers of the said St. George's Church, as the bishop of the diocese

for the time being shall, by letters under his hand and seal, from time to time direct and appoint; and I appoint John S. Cartwright, and James Nickalls, Esquires, executors of this my last will and testament."

To this will the said Henry Baker, on the 16th day of September, A. D. 1849, made and published a codicil, in the words and figures following:

"This is a codicil to my last will and testament above written. As my friend John S. Cartwright has departed this life since the execution of the above will, I hereby appoint Francis Manning Hill, of the city of Kingston, Esquire, an executor of the said will, in room and stead of the said John S. Cartwright.

"Dated at Kingston, this 16th day of September, A. D. 1846.

(Signed) "HENRY BAKER (L. S.)

"Signed, sealed, published and declared by the said Henry Baker, as the codicil of his last will and testament, in our presence and in the presence of each other.

(Signed) "EDMUND BOYLE,

(Signed) JAMES S. BARTELS."

"The defendant held the premises, and defended as the tenant of the Honourable and Right Reverend John Strachan, Bishop of Toronto, and the Venerable George O'Kill Stuart, rector of St. George's Church, of the town of Kingston, who claimed and held the same as landlords of the defendant, under the devise to them in the said will.

The lessor of the plaintiff was the eldest son, and heir-at-law of the testator, Henry Baker, and claimed the premises in question as such.

The questions for the opinion of the court were—

1st. Whether the said devise would not be void but for the statute of Upper Canada 3 Vic. ch. 74?

2ndly. Whether the said devise was a "conveyance" within the meaning of the 16th section of the said statute?

3rdly. Whether the said devise was such a "conveyance" for the purposes of the act from the date of the will, or from the time of the death of the testator?

4thly. Whether the codicil was such a republication of the

will as to make the devise aforesaid operative, from the date of the codicil and not from the date of the will?

5thly. Whether the devise to the bishop and rector operated as a valid devise under the 16th section of the said act?

If the court should be of opinion that the said devise did not convey such a title to the said bishop and rector as to prevent the heir at law from recovering in this action, then the verdict was to be entered for the plaintiff as aforesaid; but if the court should be of the contrary opinion, then a verdict was to be entered for the defendant.

McDonald, Q. C., for the plaintiff.—He cited the following authorities:—3 Vic. ch. 74, sec. 16; *Massey v. Hudson*, 2 Mer. 128; *Barnes v. Crowe*, 1 Ves. 486; *Meggison v. Moore*, 2 Vez. 630; *Pigott v. Waller*, 7 Ves. 98; *Goodtitle v. Meredith*, 2 M. & S. 5; *Hulme v. Heygate*, 1 Mer. 285; *Adams v. Austen*, 3 Rus. 463; *Williams v. Goodtitle*, 10 B. & C. 895; *Guest v. Willasey*, 2 Bing. 429.

Cameron, Q. C., for the defendant.—He relied upon *Soulle v. Gerald*, Cro. Eliz. 525; *Barker v. Suretees*, 2 Stra. 1175; *Walsh v. Peterson*, 3 Atk. 193, 390; *Doe Bean v. Halley*, 8 T. R. 5; *Cruise Devise*, 6 vol. 6; *Strathmore v. Robinson et al.* 7 T. R. 482.

ROBINSON, C. J.—Upon the first point, whether the devise made by Baker would be void without the aid of our statute 3 Vic. c. 74, I will only refer to the case decided here of Doe dem. *Anderson v. Todd*, 2 U. C. R. 83, as containing our opinion that the stat. 9 Geo. II. c. 36, would render such a devise void, unless it can be brought within some statute passed here for the express purpose of relieving against that and other statutes commonly called statutes of mortmain.

2ndly. Whether the 16th clause of our stat. 3 Vic. c. 74, extends to devises, that is, whether they are included in the term conveyances, is a question on which we have not before had occasion to pronounce an opinion. And it is an important question; for we cannot know but that there may be other such devises at this moment in existence, nor what amount of property the question may affect.

In Doe dem. *Anderson v. Todd* we had to determine

whether the statutes 9 Geo. IV. c. 2, and 3 Vic. c. 74, had the effect of giving validity to a devise of real estate to a religious body of the denomination of Methodists, and for a purpose for which we are satisfied land could not be devised in this province, except by the aid of those statutes. We determined that those enabling statutes did not extend to the case, because they only render conveyances made for such purposes legal, when made *by deed*, and it is clear that those statutes do not make *devises* for such purposes valid.

In the course of the judgment given by me in that case, I remarked that if, notwithstanding the statutes which the Legislature of this province has passed, we could hold that the 9 Geo. II. c. 36, had no application here, though our statutes are based upon the assumption that it was in force here, then this incongruity would follow, "that while people would by the statute 3 Vic. c. 74 be restricted from conveying lands to religious and charitable uses connected with the Church of England, in any other manner than by a deed made six months before the death of the grantor, and registered within six months after, they might convey their lands to religious and charitable purposes connected with any other denomination of Christians without any restriction whatever, and might devise all their estates to such uses even upon their death beds." I did not there state the provision of the stat. 3 Vic. ch. 74, quite correctly, for I should have said that while people would be restricted by it from conveying lands to the Church of England in any other manner "than by deed" "*or conveyance*" made six months before the death," &c. for those are the words of the statute.

It is in this respect then it differs from the other provincial stat. 9 Geo. IV. c. 2, and the case before us turns upon that very difference. The inaccuracy was of no consequence to the argument which led me at that time to refer to the statute, for the incongruity which I was then pointing out would have applied equally, if I had added those words because under any mode of disposition the restriction as to the six months would equally apply; but I seem to have been under the impression at the time, that the statute

referred to was so worded as only to give effect to deeds ; and I believe that was my impression, though, as the case before us turned entirely on the effect of 9 Geo. IV. ch. 2, and could not be governed by the operation of the other statute, it did not require any opinion to be given upon the latter ; and it is probable I may have spoken of its purport from memory, without at the moment looking carefully at the precise words.

But for the decision of this case, we must determine whether the statute 3 Vic. ch. 74, does not render devises for any of the purposes mentioned in that act valid, or whether the act contemplates and provides only for alienations *inter vivos*.

The first and more general act on this subject, 2 Geo. IV. ch. 2, as I have mentioned, enabled persons to convey land for such purposes by deed only. Upon that statute, therefore, no doubt could arise.

The act now in question, 3 Vic. c. 74. sec. 16, renders valid any deed or conveyance that may be made to any bishop or rector, or other incumbent of the Church of England, for the purposes mentioned in the act, "provided that such *deeds and conveyances* shall be made and executed six months at the least before the death of the person conveying the same, and shall be registered not later than six months after his decease." In one part of this clause the word "deed" is used alone, but the omission of the words "or conveyance" in that instance, which may have been accidental, cannot have the effect of preventing any operation being allowed to those words in the four other places in which they are used in the same clause.

It is a general principle in construing statutes, that we are to assume that the Legislature did not use words idly, and without intending that any meaning should be attached to them. On the contrary where they enumerate several things as in this act, we are to give a several and distinct meaning to each word used as if to express something distinct, whenever we can do so without departing from the natural and proper use of language. This rule holds in the construction of all statutes. We are therefore in the first

instance to suppose that when the Legislature throughout this clause, with one exception, used the words *deed or conveyance*, they did not mean deed alone ; for if they did, there was then no use for the words "*or conveyance*," as they would signify nothing.

We must ask ourselves then, in the first place—is there anything besides a deed by which lands may be made to pass, and which may by law be registered ? A will is an instrument by which lands may be passed, and which may be registered as this statute requires, and it is something different from a deed, and not included in that term. Then the next question is,—Can a will be properly said to be a *conveyance* ? If it can be, then by taking wills to be included in the word conveyance, as used in this statute, a meaning is given to the word which makes it import something different from the other word *deed*, and so shews that the Legislature did not use the word idly and in vain.

If, on the other hand, we cannot hold the will to be a conveyance without perverting the proper legal import of the word, and using it in a sense unknown to the law, then we should hold "wills" not to be comprehended in the word "conveyance," even though we should be driven in consequence to admit that the Legislature must have used the word idly, and without intending that it should convey any distinct meaning ; for in fact we know that this is nothing more than they do in an abundance of instances which it would be easy to quote. It does not occur to me that besides a deed there is any other instrument for conveying land which can be registered, unless it be a will. Does a will then, according to proper legal construction, come within the meaning of the word "*conveyance*"—or in plain words, is a will a conveyance ?

In Sheppard's Touchstone, pages 1, 2, we are told "that the common or general *assurances or conveyances* of the kingdom that are made between subject and subject, and are of ordinary and daily use for the transferring of lands, tenements and hereditaments from one to another, are of ten kinds : two of which are by matter of record, namely, fine and recovery ; and the rest are by matter of *deed*." Mr.

Preston corrects this passage by inserting in a parenthesis " (or in *pais* or by will, and commonly termed matters in *fait*)" and he enumerates the eight kinds of conveyance intended by Sheppard, namely, 1. by feoffment ; 2. grant ; 3. bargain and sale ; 4. lease ; 5. exchange ; 6. surrender ; 7. release or conveyance ; 8. *by devise, or by last will and testament.*

We see then that both by the author of the Touchstone, and by his learned editor Mr. Preston, wills are classed among the common *conveyances* of the kingdom, though the Touchstone does not draw the distinction which Mr. Preston does, and would even reckon them among conveyances by deed. Mr. Preston adds afterwards " A feoffment gift in tail, or lease, as an exchange of lands in one county for other lands in the same county, or a surrender, may be without *deed* as distinguished from a mere writing, and a writing is necessary only on account of the Statute of Frauds, 29 Car. II. c. 3, and a devise is an assurance by mere writing, with or without seal, and not by deed."

Mr. Justice Blackstone, in his Commentaries, vol. ii. p. 378, says, "the last method of *conveying* real property is by devise," and in page 378 he adds, " A will of lands is considered by the courts of law, not so much in the nature of a testament *as of a conveyance*, declaring the uses to which lands shall be subject, with this difference, that in *other conveyances* the actual subscription of the witnesses is not required by law, but in devises of lands subscription is now absolutely necessary by statute, in order to identify *a conveyance* which in its nature can never be set up till after the death of the devisor ; and upon this notion, that a devise affecting lands is merely a species of conveyance, is founded this distinction betwixt such devises and testaments of personal chattels, that the latter will operate upon whatever the testator dies possessed of—the former only upon such real estates as were his at the time of executing and publishing his will."

In *Harwood v. Goodright*, Cowper, 90, Lord Mansfield observed, " But a devise in England is an appointment of particular lands to a particular devisee, and is considered in

the nature of a conveyance by way of appointment, and upon that principle it is that no man can devise lands which he has not at the *date of such conveyance*." Thus it appears that a devise is treated in law not merely as a conveyance, but as being emphatically a conveyance, so that on the principles of the common law nothing can pass under it but what the devisor at the time of making his will was in a condition to convey. We cannot therefore hold, in the face of these authorities, that the word "conveyance," cannot include a devise.

And indeed our own real Property Act, 4 Wm. IV. c. 1, sets out by declaring that it is expedient to make certain alterations respecting the *conveyance* of real property *by devise and by deed*, which in itself is a plain legislative declaration that a devise is properly termed *a conveyance*.

Being then, in contemplation of law *a conveyance*, and such a conveyance as can be registered and is required to be registered, though not made by deed, it cannot be held that it does not come within the letter of the statute which extends to all deeds *or conveyances* to the uses mentioned. Still, if it were plain that though a will comes within the letter, it does not come within the spirit of the act, we might perhaps in this case, as has been done in some others, depart from the strict letter of the act in order to give effect to its evident meaning; but then, before we could reject a devise which comes within the letter of the act, it must be quite plain to us on the face of the enactment, that the Legislature did not mean to include it; for, 1st, the leading rule of construction is,—that the will of the Legislature, as expressed in their acts, is to have effect wherever it may; 2dly, it is to be assumed always that they use words of known legal import in their proper legal sense, unless we see on the face of their act that they used them in another sense; 3rdly, this rule of construction is especially to be observed in regard to laws which affect the title to real property, because the terms employed in laws relating to such subjects have an artificial and technical meaning which it is in general most important to adhere to; and 4thly, this being an enabling statute in advancement of religious and charitable objects, and favoring the natural right which men have to

dispose of their property, it is to be construed in a liberal rather than in a rigid sense.

Then, looking at the statute, does it afford incontestible evidence that the Legislature did not mean it to extend to devises? When once we have satisfied ourselves that "*conveyance*," in its proper legal sense does include a devise, then it does not seem to me that the statute can be said to give any clear evidence that the intention was otherwise. The more general statute 9 Geo. IV. c. 2, was clearly confined to deeds which any religious congregation should "have occasion to take" for the site of a church and burying ground. It does not seem to have been passed for the purpose of facilitating voluntary dispositions, or gifts made without the privity of any congregation; and being confined clearly to deeds, it requires that they shall be registered within 12 months after their execution, and makes no reference to the death of the grantor or donor for any purpose.

The statute now in question, on the other hand, clearly contemplates voluntary gifts and dispositions for various religious purposes, and it differs from the former act in allowing of such donations, not by deed merely, but by "*deed or conveyance*." Whoever framed it must, I think, have had the English statute 9 Geo. II. ch. 36, before him, and that relates especially to devises, which it places under certain restrictions. Then it takes into view, which the other statute does not, the death of the person conveying the land; and there really is ground for supposing that the framer of it, instead of having no thought of including wills, had them more in his mind than any other species of conveyance, for the act requires that the deed or conveyance shall be made and executed six months before the death of the party, which seems intended to guard, as the 9 Geo. II. ch. 36 does, against the influence of superstitious fears, or of the importunities which persons may be exposed to in their last moments. Then next, the requiring *the conveyance* to be registered not later than six months after his decease, affords an argument that conveyance by will was intended to be provided for, because that is the time within which wills are in general required to be registered, in order to

guard against subsequent alienations by the heir. If deeds only, which would have their full effect in the life of the grantor, had been in contemplation, there would have been no reason why they should not have been required to be registered within a certain time from their execution, like the deeds allowed to be made under the 9 Geo. IV. ch. 2. And it would have been absurd to have fixed the time with reference to the death of the grantor, which might not occur within 40 years afterwards. The provision, indeed, as it stands, is in that respect strange; for while by the other statute it is made necessary to register deeds given for such purposes within twelve months, it is clear that *this* statute allows six months after the death of the donor, which may not occur for a great number of years. One can only account for the framers of the act falling into this apparent incongruity by their having in their minds how the restriction would apply in regard to wills, and reflecting that it would be absurd to require them to be registered till after the devisor's death. Instead of making a provision to suit each case, they have made their restriction general, and have so *framed* it as to suit the case of wills, as if they were chiefly in view instead of being intended to be wholly excluded. If wills were really intended to be wholly excluded, then one can imagine no reason for any reference to the death of the grantor, since the grantee could register his deed at any time, whether the grantor were alive or not.

Indeed, it seems scarcely possible to imagine that this statute could be framed, making express reference, as it does, to the Statutes of Mortmain, without the person who drew it referring to the statute 9 Geo. II. ch. 36; and scarcely possible to imagine that any one looking at that act, and framing the one now under consideration, if he intended to prohibit devises for charitable purposes as that statute does, would not have adopted in some measure at least the language of that statute, which plainly excludes them, and confines all such alienations to deeds indented and delivered twelve months before the death of the grantor and enrolled in Chancery within six months of their execution.

It is material too, I think, to observe that our statute

extends to personal as well as to real estate; and if we should confine the term "conveyance" so as not to include a will, the effect would be to restrain dispositions by will of personalty in this province, for religious purposes, within narrower limits than they are restrained in England; for the 9 Geo. II. only prohibits bequests of personal property for such objects where it is directed to be laid out in the purchase of lands.

The 17th clause of the statute which we are considering seems also to strengthen the more liberal construction; for there are no words in it which can be taken to exclude devises, while the powers and facilities of endowment which it gives are very general.

This is the main point in the case, and the only one, as it appears to me, which can seem to admit of any doubt. I mean the point, whether devises come within the term "conveyances" as used in the 16th clause of this act. For the reasons I have given, we must, I think, allow to the term "conveyance" its proper legal signification, which certainly embraces devises. It is so important a question, however, that if this opinion is not thought to rest on perfectly clear ground, it is highly desirable that no time should be lost in obtaining the decision of the highest tribunal upon it.

The third and fourth points raised in the case resolve themselves in effect into one. It is, in my opinion, clear that the codicil made by the testator on the 16th of September, 1846, which merely appointed a new executor *of his will*, in the room of one who had died, was in effect a re-publication of his will, so that it would have enabled it to pass lands acquired after the execution of the will, even if our law in that respect had continued on its former footing. For that purpose, the will would have opened as it were and included them, and would have been regarded as speaking at the time of that re-publication. As the courts have expressed it, it draws down the will of the testator to that time. But it is no revocation of the instrument or of the dispositions made by it. On the contrary, it is a confirmation, being expressly a provision for its better execu-

tion, which circumstances had rendered necessary. It would be strange, indeed, if that should have the effect of defeating the devise, so as to leave the executors thus appointed nothing to execute, which might be the effect in some cases. For instance, if this had been a devise to his executors as trustees, with directions to sell and pay over the money for some of the uses mentioned in this statute; or if it had been a will of personalty only, bequeathing it for the same objects, then, by the mere act of appointing an executor to carry "*the said will*" into effect, he would by such a construction be revoking the will and leaving nothing to be executed. It is only necessary to read the cases of *Acherley v. Vernon*, Com. Rep. 381; *Barnes v. Crone*, 1 Ves. jr. 486; *Piggott v. Waller*, 7 Ves. 98; *Countess of Strathaven v. Bowes et al.* 7 T. R. 482; *Goodtitle v. Meredith*, 2 M. & Sel. 5, to be satisfied that it can have no such effect; though it might, according to these cases, operate as a re-publication of the will, so as to enable it to pass after-acquired property. To give it the effect of revoking the former disposition, would be altogether unreasonable and contrary to the plain intent of the testator.

Having made his will in 1843, his attention is called to it in 1846, apparently for no other purpose than to supply the place of an executor who had lately died; and in order to do this, he merely adds, at the foot of his will, an appointment of an executor "*of the said will above written*," leaving every disposition made by the will unaltered. Instead of this being a revocation of the former will, there could be no more clear confirmation of it. The argument on the part of the plaintiffs is, that being a re-publication, we are to consider the will as speaking only from that day, and are no longer to regard it as a will *made and executed* in 1843; and that as it happened that the testator died within two months after making the codicil, the devise is invalid as being made within six months of the death of the person *conveying*.

Another objection is taken which is in its terms rather inconsistent with this, namely, that as the will can only take effect on the death of the deviser, it cannot be said

that there is any *conveyance* till then. If so, then there would be no more a conveyance at the time of the publication of the codicil than of the will, and the effect would be very clear, that devises could not come within the operation of this act in any case, because the conveyance could not be perfect till the testator had died ; and so the condition of the proviso in the 16th clause could not be complied with, which makes it necessary that the conveyance (whether by death or otherwise) should be made and executed six months at least before the death of the person conveying the same—by which must be meant, the person conveying the land.

The two following authorities are particularly applicable to the circumstances of this case, and will show I think clearly, that if the statute 3 Vic., ch. 74, gives effect to devises at all, there is nothing in the two latter objections, which form the 3rd and 4th points in the case submitted to us.

In *Ashburnham v. Bradshaw*, of which a full statement is given in *Burns' Ecclesiastical Law*, title *Mortmain*, the case was, that in 1734 one Bradshaw made his will, devising lands to certain charitable uses ; on the 24th June 1796, the 9th Geo. II, ch. 36, passed, which made such devises void. After that, the testator died, and the question was, whether the devise, so far as related to the charitable uses, be good in law, notwithstanding the statute. It was argued, as it has been here, that a will takes effect only upon the death of the testator, and can be but an inchoate and imperfect conveyance before that. The Lord Chancellor took the opinion of all the judges, and after hearing the case argued, they certified that the gift or devise to the charitable uses was good notwithstanding the statute, considering that the disposition was made by the execution of the will, and so before the statute. The case, with the arguments of counsel, is reported in 7 Mod. 239, and is shortly stated as to the decision only in 2 Atk. 36. It will be found material, too, upon the question of a will being a conveyance, for that a will is a conveyance is assumed throughout, and it is spoken of as being favoured much more than *any other* method of conveyance.

But the case most to our present purpose is *Willet v. Sandford*, 1 Ves. sen. 178, 186; *Ambler*, 463. There a will devising lands in trust, for a charity was made before the statute, and after the statute the testator made a codicil, devising the same lands with other land to the same trustees, and to other trustees for the same charity, making some slight alterations in other parts of the will, but confirming it in the rest, and declaring that the codicil should be annexed to, and taken as part of his will—Lord Hardwick held, that as to the lands given by the will, the devise was good, as the codicil did not revoke it, but was intended by the testator as a confirmation of the will, and both from the nature of the instrument and the words was to be taken as a part of it. But as to the additional land given by the codicil, the devise was void, it being devised only by the codicil, which was subsequent to the statute.

This seems to come fully up to the present case, as to the 3rd and 4th points, and it throws light also upon the 2nd—namely, whether the devise is a conveyance—for it is evident that the courts have, in these cases, treated the devise as a conveyance made and executed at the date of the will, and not as a mere expression of intention having no force for any purpose till the testator's death. In one of the cases its operation, as a conveyance, is likened to that of the conveyance of a contingent remainder, which is perfect as a conveyance, though its effects cannot be felt till the contingency happens.

The last point in this case involves no doubt, we think. The statute allows of a conveyance either to the bishop, or any rector or incumbent, for such uses as are mentioned in this will; the objection made is, that this devise is not made to either, but to both; and therefore, it is contended, neither can hold; but this is a position that was not attempted to be supported by any authority.

If in any such case one of the devisees could not hold, being for any cause incapable, the other, nevertheless, might, but there is no doubt that both here may take where each is legally capable. There can be, I think, no question after all but the main one, whether a devise is a convey-

ance within the act ; and I repeat, if that be thought still doubtful, it is very desirable that the best means should be taken, without delay, for setting the doubt at rest.

My opinion is, that the defendant is entitled to the postea.

McLEAN, J.—As to the first point, I have no doubt that the devise to the bishop of Toronto and the rector of St. George's church in Kingston, would be void under the statute 9 Geo. II. ch. 36, which, in the case of Doe Anderson v. Tod (2 U. C. Reports, 90), I have declared is in my opinion introduced as the rule for the decision of cases coming within its provisions in this province. If, therefore, our provincial statute 3 Vic. chap. 74, does not embrace a *devise* under the circumstances of this case as a *conveyance* of land according to the intent and meaning of that statute, the title under which the defendant claims must fail.

That a will does operate and must be regarded as a conveyance of land, where land is devised by one person to another, admits of no doubt ; but it does not follow that it is such a conveyance as our statute contemplates. By the statute, any deed or *conveyance*, to be valid, must be *made and executed* six months at the least *before the death* of the person conveying. The will in this case was made six months before the death of the testator ; and the case of Willet v. Sandford (1 Ves. sen. 178 & 186) satisfies me that it may be considered as executed on the day it bears date, and not on the day of the date of the codicil appointing an executor.—1 Ves. sen. 178, 186 ; Ambler, 97, 437, 573 ; 1 Ves. Jr. 486 ; 2 Mer. 129 ; 7 Ves. 98 ; 10 Ves. 605 ; 10 Ves. 611. But then the question arises, when does the will become operative, so that it becomes a conveyance ? While in the custody of the testator, and liable at any time to be changed or cancelled by him, it could not possibly be regarded as a *conveyance* ; it could convey no interest to anybody till the death of the testator—then it would convey the property to the devisees, if there were no law to prevent such a devise from being valid. But the statute interposes and says that the *property* must have been *conveyed* six months before the death of the party conveying : that, I think, is the plain meaning of the 16th section.

Now, if a deed were made for the same purpose as the devise in this case, but not delivered, the grantor retaining possession of the land and the entire control of the title till within an hour of his death, it could not be regarded as a conveyance of land, *made and executed* six months before the death of the party.

The *delivery* of a deed is essential to its execution (Bla. Com. Rights of Things, 307); and if such delivery did not take place till within a short period of the death of the grantor, so that the deed was not fully executed six months before the death of the grantor, it could not operate as a valid conveyance of property within the meaning of the statute.

There seems to me to be no very good reason why a person should not be at liberty to dispose of any property by will made six months before his death, to the same purposes and objects that he could convey the same property for by deed. The object of requiring the conveyance to be executed six months before the death of the party conveying, would be answered equally well in either case, to prevent advantage being taken of a period of weakness or distress of body or mind in any sickness preceding death; but it does not appear to me that the terms of the 16th section of the statute are sufficiently comprehensive under the term "conveyance" to include a devise of land. The terms "deed or conveyance" appear to have been used in that section as synonymous terms, or the legislature may have intended the term "deed" to apply to lands, and "conveyance" to personalty, when it says "that any *deed or conveyance of any land* or of *personalty* that may be made to any bishop," &c.

There is, I think, in the section referred to, some evidence that the legislature only intended that lands should pass *by deed* for the purposes mentioned in it; for it says that any deed or conveyance to any bishop of the church for the endowment of his see, or for the general uses of the said church, as such bishop may appoint, or otherwise; or for the use of any particular church, or for the endowment of any parsonage, rectory or living, or for other uses and pur-

poses appurtenant to such church in general, or to any particular church or parish *to be named in such deed*, omitting the words "or conveyance," which are used in connection with "deed" in the other parts of the section. That omission may, however, have been accidental, and no great weight can be attached to it, inasmuch as in a subsequent part of the section, which admits of deeds or conveyances to a rector or parson, or other incumbent, it says that such deed or conveyance shall be valid and effectual for the uses and purposes in such *deed or conveyance* to be mentioned and set forth. This view of the case is in accordance with the opinion expressed in the case of Doe Anderson v. Tod in this court; but the question there did not turn upon the particular construction of any section of a statute; but whether the devise was valid in law or was prohibited by the statutes of mortmain.

After the best consideration which I have been able to give to the 16th section of the statute, and with every desire to carry the intention of the testator expressed first in his will, and confirmed by his adding a codicil and still retaining the same devise, I am obliged to come to the conclusion that any conveyance of land, to be valid, must be executed and have the force and effect of a conveyance for a period of six months before the death of the party conveying, and that no such conveyance has been made in this case.

DRAPER, J., gave no judgment, having been concerned in the case while at the bar.

SULLIVAN, J., concurred in opinion with the Chief Justice.

MACAULAY, J., being in the Practice Court during the argument, gave no judgment.

Per Cur.—Rule discharged.

SHOULDICE v. FRASER, SHERIFF.

When the court will look into sufficiency of declarations of their own accord—Action against the sheriff for an escape before return of writ and after special bail put in—Averments in declaration—Notice of justification of special bail.

Where no notice of an exception to declaration—after demurrer to plea—has been given, the court will not entertain such exception of their own accord, unless the declaration shews that, on the facts stated, the plaintiff really has no ground of action.

Semble, that it is not necessary, in declaring for the escape of a defendant surrendered before judgment, to shew whether it was before or after the return of the writ.

The averment in the plea, that the affidavit of the due taking of the recognizance or of the justification "was duly filed with the Clerk of the District Court," is sufficient.

A sheriff cannot justify discharging a prisoner from his custody, surrendered to him by the bail to the sheriff before the return of the writ, by pleading the perfecting of special bail, without shewing, at the same time, that the plaintiff had notice of the special bail and of their justification.

Declaration.—Case against the sheriff for an escape of a prisoner surrendered to sheriff by his bail.

Plea.—That before the escape of the said Robinson Lyon from out of the custody of him the said defendant, as in the said declaration is mentioned, and while the said Robinson Lyon was in the custody of him the said defendant, as such sheriff as aforesaid, to wit, on the 7th day of November, 1848, a recognizance of bail, commonly called special, was only put in for the said Robinson Lyon, the defendant in the said action, before Robert Hervey the younger, Esq., a commissioner duly appointed for taking special bail in and for the district of Dalhousie, by Edward Griffin of Bytown, in the said district of Dalhousie, merchant, and John Rochester the younger, of the same place, butcher, as special bail for the said Robinson Lyon in the said cause, at the suit of the said plaintiff, and in which said cause the said Robinson Lyon was then in the custody of the said defendant; which said recognizance of bail, with an affidavit of the due taking thereof, and an affidavit of the justification of such bail, were duly filed with the clerk of the district court of the district of Dalhousie, in which said court the said cause against the said Robinson Lyon was then pending. And the defendant further saith, that the said recognizance of bail was filed in the office of the said clerk of the district court of the district of Dalhousie, on the 7th day of November, 1848, and notice thereof was duly given to the attorney for the said plaintiff in the said cause, before the time for putting in special bail in the said cause in this plea mentioned had expired; and this the defendant is ready to verify, &c.

Demurrer.—That the defendant hath not shewn in or by the said plea, that the affidavit of the due taking of the bail

therein mentioned or the affidavit of justification was filed in the office of the clerk of the District Court, or that the bailpiece or such affidavits was or were so filed, or notice of bail given, or the said bail perfected before the committing of the grievances in the declaration complained of.

Exceptions to the declaration, intended to be taken on the argument :

1st, That it was not shewn therein that bail was put in before the return of the writ.

2ndly, That no judge's order or supersedeas was shewn, to warrant the discharge or escape.

Eccles for the demurrer. *Vankoughnet* contra.

The authorities cited were—*Williams v. Mostyn*, 4 M. & W. 149 ; *Lane v. Bennett*, 1 M. & W. 70 ; *Hearne v. Stowell*, 12 A. & E. 719 ; 2 Ch. Pl. 522 (6th ed.)

ROBINSON, C. J., delivered the judgment of the court.

The defendant, on the argument of the demurrer to this plea, desired to take exception to the declaration ; but having given no notice of his exception, he was not entitled to be heard, and we should not entertain any such exception of our own accord, unless we see clearly that the declaration is so substantially defective as to shew no legal cause of action—or rather, unless the declaration shews that on the facts stated the plaintiff really has no ground of action.

Is it or is it not necessary, in declaring for the escape of a defendant surrendered before judgment, to shew whether it was before or after the return of the writ ; and if it were before the return, then to aver that the defendant did not appear according to the exigency of the writ ? It seems not to be considered necessary, for the plaintiff has closely followed a form given by Mr. Chitty (vol. ii. p. 556) under similar circumstances ; and, besides, the plea would cure any objection on that head, for the defendant relies on his having put in bail, and so brings it to a question whether he shews that what has been done entitles the defendant to be discharged. We are therefore to confine ourselves to the plea.

The plaintiff takes two exceptions : 1st, that it is not shewn that the affidavit of due taking of recognizance, or of

justification, was filed in the office of the clerk of the District Court. The plea says they "were duly filed *with the clerk of the District Court*," which in our opinion is equivalent; filing them duly with the clerk is filing them in his office. 2ndly, It is objected, that it is not averred that the bail-piece, or the affidavits of due taking and of justification, was filed, or notice of bail given, or that bail was perfected before the escape. The plea states that the recognizance, *with the affidavit of due taking and of justification*, was filed, which we take to mean that they were filed together, that is, at one time; and the plea afterwards states that the recognizance was filed (that is, that it was filed as before mentioned with the affidavits), and notice given *before the time for putting in special bail had expired*.

The defendant in the original action had in fact appeared by putting in special bail before the return of the writ. The case then, according to the practice of the Queen's Bench, to which the District Court practice is required to conform, would not come under the 13th clause of 2 Geo. IV., ch. 1., which applies only where the defendant remains in custody after the return of the writ; but, nevertheless, I conceive that, in order to entitle the defendant to his discharge as having perfected bail to the action, it should be shewn that the plaintiff had notice of the bail and of justification, in order that he might oppose their allowance, and except to them if insufficient. What is stated here is, that notice of the filing of recognizance which, according to the previous statement, was filed with the affidavit of due taking and of justification, was given before the time for putting in bail had expired; but, for all that appears, no notice of anything may have been given until after the prisoner was discharged, and so the plaintiff may have had no means of enquiring into the sufficiency of bail or of excepting; and as the sheriff does not shew that any supersedeas issued to him authorising the discharge of the prisoner, he relies upon the perfect regularity and sufficiency of what was done as justifying him in discharging the prisoner of his own accord.

It is objected, and we think rightly, that the sheriff should

have waited till bail had been allowed, and the prisoner ordered to be discharged by supersedeas. Having discharged him before any such authority came, he has, we think, discharged him illegally; and that being so, the plaintiff cannot but have a valid cause of action, if he has been obstructed and delayed in his suit, as he alleges he has been, for the prisoner having been surrendered by his bail, the plaintiff is entitled to have the security of his person during the progress of the cause.

He cannot proceed further after having received notice of the bail, which has been put in without waiving any objection to the bail; and if we were to hold the defendant in the original action to have been legally discharged from custody, it would amount to this, that the bail to the sheriff may relieve themselves and their principal by putting in two persons who are literally worth nothing, provided they are hardy enough to justify, and this form having been gone through, the plaintiff may then, for the first time, be notified of it, after the prisoner has been discharged, and can have no redress.

Per Cur.—Judgment for the plaintiff on demurrer.

ROSS ET AL. V. ROBERT CODD.

Liability of a party whose name does not appear upon the face of a bill of exchange—either specially on bill or on the common counts.

No action lies *upon a bill* except against those who are in some shape parties to the bill itself. Where, therefore, A. drew a bill of exchange on B., in Montreal, in his own favour, and endorsed it to C., who, in her own name endorsed it to the plaintiff; and it appeared upon the evidence that C. was a lady residing in Toronto, who had a brother D. residing in Buffalo, for whom, though not a partner, or in any way transacting business in her name, she had negotiated bills in Toronto at banks and with merchants: it was *Held per Cur.*—that in an action *on the bill* brought by the plaintiffs, the endorsees, against D., upon an averment, “that A. endorsed the said bill to one C., the agent of *this defendant*, or her order, and delivered it so endorsed to her as *such agent*—and that the said C., then being the agent of the defendant in that behalf authorized for, and on behalf of the defendant, then endorsed and delivered the same to the plaintiff”—that the action could not be sustained, the name of the principal D. not appearing *upon the bill* in any shape.

Semble, however, that a defendant's indorsement made *by his wife*, though in her own name, and proved, as in this case to have been afterwards recognized by the defendant—would make him liable to an action on the bill.

The party discounting a bill has *in general* no recourse whatever upon the person from whom he has taken the bill, when the latter has not in any way made himself a party to the bill; peculiar circumstances, however, may render a party, whose name does not appear upon the bill, liable to the holder *on the common counts*; and it was *Held, per Cur.*, that the evidence in this case (which see below), warranted a recovery against such party, upon the common count for money had and received.

This was an action on a bill of exchange. The declaration was by indorsees against the defendant as indorser, setting out that one Hopper, on the 13th December 1847, drew a bill of exchange directed to one George Campbell, at Liverpool, in England, requiring him to pay, 90 days after sight, to Hopper's order, 175*l.*; that Hopper indorsed the said bill to one *Margaret Elizabeth Codd, the agent of this defendant, Robert Codd*, or her order, and delivered it so indorsed to her, as such agent; and that the said Margaret E. Codd, then being the agent of the defendant in that behalf authorized, for and on behalf of the defendant, then indorsed and delivered the same to the plaintiffs. The declaration then averred presentment to Campbell, and protest for non-acceptance, and due notice thereof to the defendant, and concluded thus: "And the defendant then, in consideration of the premises, promised the plaintiffs to pay them the amount of the said bill on request."

Common counts were added for money had and received, money lent, and upon an account stated.

The defendant pleaded to the first count; 1st, that he did not indorse the said bill in manner and form, as the plaintiffs had above in their said first count alleged.

2ndly. That he had not due notice of non-acceptance, in manner and form, &c.

3rdly. Non-assumpsit to the common counts.

Upon the trial these appeared to be the facts: The defendant, Robert Codd, is a merchant or broker, carrying on business at Buffalo, in the State of New York; Margaret E. Codd is his sister, and resides in Toronto.

It was not proved that any partnership exists, or had existed, between them, or that the defendant had carried on any kind of business in her name, using it as a name of business: but it was proved that she transacted affairs of this kind for the defendant, in Toronto, generally, at banks and with merchants. The evidence on that point was very full.

Hopper, the drawer of this bill, lives in Montreal, and being indebted to the defendant in nearly 400*l.*, he had drawn this sterling bill upon his correspondent, Campbell,

in Liverpool, and remitted it to the defendant, in Buffalo, on account.

It seems that the defendant sent it over to Toronto, to his sister Margaret E. Codd, to be negotiated, and she took it to the plaintiffs, who are merchants in large business in Toronto, and sold it to them at the current rate of exchange.

It had at that time the indorsement of Hopper upon it in blank, the bill having been made payable by him to his own order; and over his name the defendant wrote "pay M. E. Codd, or order;" and then M. E. Codd indorsed in her own name, specially to the plaintiffs, who sent it to England with their indorsement in blank upon it.

The name of Robert Codd was nowhere signed or referred to on or upon the bill. It was not proved that Margaret E. Codd had ever negotiated any such bills with the plaintiffs before, or that she had had any accounts or dealings with the plaintiffs, further than that they had before bought from her drafts upon New York, which were signed in her own name.

The sale of the bill to the plaintiffs was, for all that appears, a transaction in the common course of such matters among merchants, not connected with any other dealing and not attended with any other special stipulation.

On the 22nd February, 1848, the bill came back to the plaintiffs protested for non-acceptance, and on the same day they sent notice of this to Margaret E. Codd, for the defendant, Robert Codd.

On the 14th March, the defendant, who had been informed in the mean time of the non-acceptance of this bill, wrote a letter from Buffalo to the plaintiffs, which, from its reference to another money transaction, showed that they had had intercourse with each other in the defendant's line of business as a money broker; and after asking the plaintiff's direction in respect to this other transaction, the defendant wrote, "Also give me the name of your correspondent at Liverpool, that the draft may be protected for my account there, to save disappointment to your friends and expenses all round, as I have had to take security for the debt from the drawer." This related to the bill now sued upon.

It was further proved on the trial, that when the defendant found the bill had been dishonoured, he sent an agent to Hopper, at Montreal, and pressed him to arrange it; and that Hopper, in consequence, assigned to the defendant, or to his agent for him, a mortgage which he held for 400*l.*, being required to secure the whole amount of his previous debt to the defendant, as if this bill had never been remitted to him; and that he soon afterwards paid to the defendant's attorney, for him, 46*l.* in cash, and gave him a sterling bill for 66*l.*, drawn against a shipment of Hopper's, which bill produced about 80*l.* currency. And it was further proved, that when Hopper made the above arrangement with the attorney of the defendant, it was on the express condition that the defendant was to protect this bill.

At the trial, before the Chief Justice, both parties seemed to treat the case as if the only question was, whether the plaintiffs could recover against this defendant upon the bill under the first count. It appeared to the learned judge clear that they could not, and he so ruled.

Verdict for the plaintiffs to the full amount of the bill.

Bell moved for a new trial on the law and evidence and for misdirection. He cited the following authorities—*Emley v. Lye*, 15 E. R. 7; *Sowerby v. Butcher*, 2 Cr. & M. 368; *Sowerby v. Butcher*, 4 Tyr. 320; *Rew et al. v. Pettet*, 1 A. & E. 196; *Bult v. Morell*, 12 A. & E. 750; *Ducarry v. Gill*, 4 C. & P. 120.

Cameron, Q. C., and *Dr. Connor* shewed cause. They cited *Leadbetter v. Farrow*, 5 M. & S. 349; *Linders v. Bradwell*, L. J. 17 vol. C. P. 121; *Fenn v. Harrison*, 3 T. R. 757; same case, 4 T. R. 177.

ROBINSON, C. J., delivered the judgment of the court.

I am still of opinion that no action lies against Robert Codd *upon this bill*, and will refer only to the judgment of this court in the recent case of *Bank of Montreal v. Delatre*, 5 U. C. R. 362, and the cases there cited, for the grounds of my opinion.

We all agree in this opinion, and that there is no book or decision of good authority that can be relied upon for supporting the contrary. *Williamson v. Johnson*, 1 B. & C.

146, does not apply, because there was no evidence here that the defendant had been in the habit of transacting business under the name of Margaret E. Codd. Neither are any of those cases (*Linders v. Bradwell*, 5 C. B.) in point, where a wife, as agent for her husband, has indorsed a bill in her own name which she had taken for her husband, and the question has arisen, whether the maker could be sued by her indorsee, because there the only point was with respect to the passing the property in the bill, the action being against a party clearly liable on the face of the instrument. So also those cases are beside the present, where a husband has been sued as acceptor upon an acceptance signed by his wife in her own name, and it has been proved that she acted by his general or special authority; because in those cases the bill was addressed to the husband—his connection with it appears on the face of the bill—and the wife, by writing "*accepted*" on such bill, and signing only her own name, may, without looking out of the instrument, be fairly taken to declare "for A. B. on whom this bill is drawn, I accept it," and being, legally speaking, identified in person with her husband, the action has under such circumstances been sustained against him as acceptor. That is only an extension of the same principle as that on which Lord Ellenborough decided in *Mason v. Ramsay et al.* 1 Campb. 384, where a bill drawn on Messrs. Ramsay & Co. was accepted by one of the firm, thus, "*accepted, T. Ramsay, sen.*," without any words denoting that it was accepted for the firm. Lord Ellenborough said: "If a bill is drawn upon a firm and accepted by one of the partners, he must be understood to exercise his power to bind his co-partners and to accept the bill *according to the terms in which it is drawn.*"

There was no doubt in the present case that Margaret E. Codd was in fact the agent of her brother, fully authorized to represent him in such transactions, and if the case would have been helped by the jury finding that the plaintiffs knew that fact, and that they took the bill, looking upon her indorsement as one which they had reason to treat and recognize as binding upon him, I dare say

they would have had little difficulty in coming to that conclusion. But all that would not make this case stronger than many others, in which it has been held that the principal cannot be held liable on the bill, as indorser, where his name does not appear in any shape upon it. That is the fact here. It is not true, as the declaration states, that Margaret E. Codd endorsed the bill for the defendant, that is, the bill does not shew it, which is the only proof we can receive of it in order to charge the defendant upon the bill. If she had put above her name "for Robert Codd," or had written Robert Codd, by Margaret E. Codd, then the case would have been clear against the defendant, as indorser. What was meant on the one side, and understood to be meant on the other, is clear enough probably to produce entire conviction; but the principle is broad and is consistently maintained, that no action lies upon a bill, except against those who are in some shape parties to it. This seems to have been assumed as clear in *Fenn v. Harrison*, 3 T. R. 735.

But though I considered at the trial that the count on the bill could not be supported, I thought the plaintiffs might be allowed to recover on the count for money had and received. I believe the plaintiffs' counsel did not expect to be able to maintain their action otherwise than on the bill; but I directed the jury, that if they were satisfied with the proof of due notice, which seemed to me sufficient, so that the plaintiffs could not be said to have made the bill their own by laches, I did not see why they should not recover on the common counts, for undoubtedly the defendant received the money for the bill. His letters and conduct shewed that. They found for the plaintiff, on this direction, for the bill and interest, 241*l.* 4*s.* 8*d.* And the defendant has moved for a new trial on the law and evidence, and for misdirection.

Was it proper that the plaintiffs should have been allowed to recover on the count for money had and received? That is now, I think, the only question. We have no ground for looking on the transaction as anything else than the common one of selling a bill. Margaret Codd took it to the plain-

tiffs, as she might have taken it to any broker or bank, and discounted it; and I am satisfied now, though I was not upon the trial, that *in general* in such cases there is no recourse by the party discounting upon the person from whom he takes the bill in case of the bill being dishonoured, unless the latter by indorsing it has given a remedy against himself upon the bill.

If this defendant, who was really the owner of the bill, had gone to the plaintiffs in person and sold the bill, as his sister did for him, but had not indorsed it, no action would have lain against him in any shape to recover back the money.

If, indeed, he had been previously indebted to the plaintiffs, and had transferred this bill to them on account, then, whether he indorsed it or not—they receiving it on the usual terms, that is, to be credited if paid, and not on the understanding that they took it at all hazards, as is sometimes done, upon the bill being dishonoured, the plaintiffs would undoubtedly have had a remedy against the defendant; but that would have been upon the original consideration—in other words, their debt would to that extent have continued unpaid, and they could have sued for it as if they had taken no such bill. But that was not the position of these parties; neither was it, however, in the case of *Ducarry v. Gill, Moo. & Mal. 450; S. C. 4 C. & P. 121*, where *Bagnold & Andrews*, as agents of *Gill* in South America, drew a bill on *Spooner & Co.* which *Ducarry* discounted there, and the money was applied by *Bagnold & Andrews* to purposes of *Gill* and his co-partners. The bill was dishonoured when presented for acceptance, and *Ducarry* sued *Gill* on the bill as drawn, proving the agency of *Bagnold & Andrews* as clearly as the agency was proved in the case before us. It was contended for the defendant, that there could be no recovery against *Gill* as the drawer of the bill; and Lord *Tenterden* held that to be clear “For even,” he said, “supposing the agents have authority to bind him, they have not done so, inasmuch as they have drawn the bills in their own names, and not as agents,” which is exactly the case before us. Then the plaintiffs contended, that they could recover

against Gill on the common counts for money lent ; but the defendant's counsel resisted this : " It was merely," they said, " a transaction of discount, and the plaintiff's only claim was on the bills against the parties to them ;" and they cited *Emly v. Lye*, 15 E. R. 7. Lord Tenterden, however, directed for the plaintiffs : " I think," his lordship said, " the defendant is liable for money lent ; Bag-nold & Andrews are there " (that is, in South America) " as the agents of the association " (to which Gill belonged), " and they borrow this money for the purposes of the asso-ciation, and apply it fairly." In the following term a rule nisi was obtained to set aside the verdict, on the ground that the defendant was not liable on the money counts, but what became of that rule is not stated by the reporters.

It was said of Lord Tenterden by an eminent judge, that no higher authority could be cited in his day upon the law of bills of exchange. It is noted by Mr. Harrison, in the supplement to his Digest, that the rule for new trial was made absolute ; but I find no report of it. And as *Ducarry v. Gill* was reported in *Moo. & Malk*, and 4 C. & P. 121, as being tried in 1830, it is singular that in Mr. Chitty's edition of his work on bills, published in 1840, he should treat Lord Tenterden's ruling as authority, and should not seem to be aware that it had been reversed, for he cites it, page 33, note a., to shew that the principal cannot be sued as drawer on a bill drawn by an agent in his own name ; " but that if the produce of the bill came to the principal's hands, he may be sued for the amount in certain cases," for which he cites *Ducarry v. Gill*. Mr. Starkie also, in his carefully compiled work on evidence, re-published in 1842, refers to this case as establishing the same thing, and does not seem conscious that it had been overruled, though he is writing twelve years afterwards.

If Lord Tenterden was not in error in *Ducarry v. Gill*, I do not see why the principle which he then maintained would not equally apply here, for there was nothing to shew that that was any other than a common transaction of dis-count. All the cases of discount at a bank are as much loans as that was. A merchant here, for instance, requires

money to purchase flour for his correspondent in Lower Canada ; he draws a bill upon him and indorses it and discounts it a bank, and thus obtains in effect a loan of money, as much as Gill obtained a loan in the case referred to. But these are not in contemplation of law transactions of borrowing and lending, but of discount or sale of a bill ; and although Lord Tenterden's ruling has much apparent support in what was said by the judges in the case of *Fydell v. Clark et al.*, 1 Esp. C. 447 ; *Fenn v. Harrison*, 3 T. N. 757, and *Denton v. Rodie*, 3 Campb. 493, yet it seems to me to be quite inconsistent with *Emly v. Lyre*, 15 E. R. 7 ; *Thicknesse v. Bromilow*, 2 C. & J. 425, and with other cases of undoubted authority.

I do not, therefore, now consider that an action would lie against this defendant as for money lent, on the ground that the money received by his sister on the sale of the bill passed to his use ; or for money had and received, upon the principle that the bill being dishonoured, the consideration for which the plaintiffs paid the money had totally failed. I thought, at one time, that the defendant might be liable on that principle, but I am satisfied that he cannot be so held, because, on the same principle, every person for whom a bill was discounted that was dishonoured, might be bound to refund, which is certainly against the well understood course of such transactions. And it is true, besides, as was remarked by Mr. Bell on the argument of this case, it cannot be said that there is in such cases a total failure of consideration, since the indorsee has his recourse against the parties to the bill, as in this case he would have against the drawer, and against Margaret Codd as actual indorser.

But there are circumstances peculiar to the case before us which, in my opinion, fully entitled the plaintiff to recover. Although the defendant did not in fact indorse this bill, yet he was conscious that it was negotiated by his agent on his behalf and for his benefit ; and whether he imagined (as is very probable he did till he received better advice) that he was legally bound by his agent's indorsement, or was willing to act as if he was, he first demanded of Hopper, his debtor, to settle or secure the whole original

debt as if he had sent them no such bill; and having arranged with Hopper to his satisfaction, he then did only what was common justice when he wrote without delay to these plaintiffs that "he wished to protect the draft at once for his account in England, to save disappointment to plaintiffs and their friends and expenses all round; and in the same note he announced to them that he had taken security from the drawer (Hopper) for the debt. Then we see what he had done with Hopper: he took a transfer from him of a mortgage which Hopper held for 400*l.*, which we may assume to be a valid security for the money; and he replaces him in the position he stood in before he gave him this bill—that is, he held him his debtor for the whole debt, 382*l.* and interest—as if this transaction about the bill had never taken place. In other words, he says to him, "The payment you intended to make through the bill has turned out to be no payment; for though I did sell the bill and get the money for it, which I still hold, yet I shall have to return that money to Ross, Mitchell & Co. (these plaintiffs), whom I am bound to protect (as he seems to have supposed he was in law at the time); therefore you must act as if you still owed me the whole debt, and secure it and make payment as fast as you can." Hopper agreed to this, as he reasonably might, only stipulating, as was just, that in that case this defendant must protect the bill and see it retired; in other words, he says, "You must pay the holders, Ross, Mitchell & Co., and not leave me to do it as drawer; for in that case you would be receiving payment of that portion of your debt twice over." The defendant in his note of 14th March, to the plaintiffs, had indicated that he had taken that course; and the evidence shews that he agreed to do it through his agent, and that Hopper acted upon the understanding in good faith, and afterwards paid 46*l.* and a further sum of about 80*l.* on account of the 400*l.*, for which the defendant also holds the assigned mortgage.

This, in my opinion, gives the plaintiffs a clear right of action to recover the money that had been paid in effect to the defendant for the bill; for when the defendant closed

his undertaking with Hopper he agreed to return the money, and from that moment can only be considered as holding it for the plaintiffs.

This arrangement made with Hopper was in its effect an appropriation of the money which he had actually received to the use of the holder of the bill, as was held by Lord Kenyon in *Stevens v. Hill*, 5 Esp. N. P. C. 247. I refer also to *Fermer v. Mears*, 2 Bl. Rep. 1269.

These plaintiffs had a clear right of action on the bill against Hopper as the drawer; and if the latter, on demand, had paid the money after he had read the defendant's promise upon good consideration that he would protect the bill, he could instantly have turned round upon the defendant and sued him for non-performance of his promise. It is only, therefore, preventing circuitry of action to compel the defendant to pay it over to the holders as he engaged to do, and as he was in conscience bound to do, if he had not promised it; for he could never be allowed to insist upon receiving his whole debt from Hopper and still keep the proceeds of the bill. I am therefore of opinion that the verdict is right upon the evidence, and that the rule must be discharged.

Since the argument of this case, we have seen the case lately decided in England, as reported in 5 C. B. Rep. 583, of *Linders v. Bradwell*. It may perhaps seem to us hereafter, in some similar case, upon more mature consideration, to support a recovery even upon the bill under such circumstances. The language of the judges is certainly strong, but they were applying it to the case of an indorsement made by the defendant's wife though in her own name, and afterwards recognized by the defendant, as this indorsement, I think, was amply proved to be by this defendant.

We do not at present think, however, that the learned judges would have used the language in reference to an indorsement made by any third party in his own name who was capable of binding himself by such indorsement, although the indorsement should be recognized by the principal as having been made by him. I do not feel certain

that they would not so decide, though I think that a decision to that effect would be quite inconsistent with previous cases.

This defendant, I must say, should not have endeavoured to evade his liability on the note, more especially after what had taken place subsequently between him and Hopper; and I am glad that I am able clearly to bring myself to the conclusion that upon the evidence the plaintiffs were entitled to recover on the common count for money had and received. It is clearly not necessary to a right to recover on that count that at the time when the money was received its appropriation to these plaintiffs should have been directed. That may result as a legal and just consequence of subsequent arrangement among the parties: many of the cases are of that kind.—Lord Raymond, 928. Neither is it necessary that there should have been a privity in any previous transaction, out of which this particular sum of money arose. I refer to the common case of—A. instructing B. to pay to C. a sum of money which B. has in his hands belonging to A.: in which case, if B. communicates with C. that he has such money to pay him, an action for money had and received would lie, though there had been no privity in regard to any particular transaction between A. and C. to which that sum of money related.

Per Cur.—Rule discharged.

HUNTER V. CORBETT.

Granting a third new trial in cases of fraud—What badges only of fraud—What conclusive evidence of fraud—Technical objection urged as a ground for a third new trial, when not raised to the first new trial granted to investigate the merits—Form of action under the facts—Trespass or trover?

Where the question of fact for the jury to decide is a question of fraud, and they have twice decided against the fraud, and in favour of the plaintiff, the court will not, except in very glaring cases, grant a third new trial.

The fact, that a bill of sale, while importing on the face of it to be an absolute bill of sale, is in truth only a mortgage; and the further fact, that the vendor, after the sale, is allowed to remain in possession of the goods—are both badges of fraud, to be weighed by a jury—not proofs of fraud, so conclusive as to leave the jury no alternative but to find fraud, whether they believe it or not.

Where the defendant had obtained a new trial *upon the merits*, and then, for the first time, at the second trial, objected that the plaintiff had misconceived his action, and should have brought trover and not trespass, which objection was overruled at the trial, and subsequently pressed in banc: *Held, per Cur.*, that they would not, under the circumstances, set aside a second verdict for the plaintiff on this technical objection.

Quære.—Where A. is in possession of goods, not for any certain time, as tenant or otherwise—but as merely using them with the permission of the owner, who could step in at any time and claim the possession—is trespass or trover the proper remedy for the *owner of the goods* against a sheriff selling the same under an execution against B. ?

Trespass for taking goods.

The declaration contained two counts charging the trespass on different days.

Pleas to each count : 1st, Not guilty.

2nd. That the goods were not the plaintiff's goods.

The facts of this case are stated at length in the judgment of the court.

Verdict for the plaintiff 215*l.* 15*s.* 2*d.*

Smith, Q. C., obtained a rule for a new trial on the law and evidence.

McKenzie shewed cause.

The authorities cited were—Hall v. Pickard, 3 Camp. 187 ; Lotan v. Cross, 2 Camp. 464 ; Hitchman v. Walton, 4 M. & W. 409 ; Wheeler v. Montefiore, 11 L. J., Q. B. 34.

ROBINSON, C. J., delivered the judgment of the court.

This case has been already twice tried. The first trial took place before me in the spring of 1848. One Hastings, in the spring of 1846, had taken an inn in Kingston, and was furnishing it ; he employed this plaintiff to make up carpets, and do various jobs as an upholsterer, and bought articles of furniture in his line, altogether to the amount of 370*l.* And he swore that it was the original agreement between them, that he was to give security to the plaintiff for the amount of his account. Hastings had come recently to Kingston, and owed some debts to others in the part of the country where he had lived before. In the summer of 1846, after the plaintiff had completed the order, and everything was delivered at the inn, and was in Hastings's possession, and four promissory notes given by Hastings to the plaintiff for the amount, a bill of sale was executed by Hastings to the plaintiff of the articles enumerated in it, which were only those furnished by the plaintiff, or on which his labour had been expended. Opposite to each article a sum was set, intended, it was explained, to denote the plaintiff's charge against Hastings in respect to that particular article. Thus, for instance, there were sixteen

carpets, none of which had been furnished by the plaintiff, but he had made them up, and his upholsterer's bill was 6*l.* odd, in respect to the whole, and that sum accordingly was set opposite to those articles, which could not be taken to mean that it was their price or value, and it was explained on the trial to mean that it was the plaintiff's charge or claim upon these articles, for which amount Hastings was willing to give him security upon the article itself. But the instrument on the face of it was a plain absolute bill of sale, purporting to transfer the property for the sum of 370*l.* A formal delivery of possession took place at the time of execution, but everything was nevertheless allowed to remain in the inn, and was used by Hastings as his own till the following winter, when the sheriff seized and sold it in execution, at the suit of a creditor of Hastings.

The plaintiff immediately went forward and made his claim, and forbade the sheriff to sell. In the meantime two of the four notes given by Hastings to him had been paid, and he stated truly that his claim upon the goods amounted only to 190*l.*, but he insisted on his right to retain them until that amount should be paid.

The sheriff, when this claim was made, naturally applied to Hastings, whose conduct and declarations seem to have been such as led the sheriff to conclude that the bill of sale to this plaintiff was fraudulent and colorable, and that he might safely so regard it.

At one time Hastings appears to have said, that the bill of sale was given by him to set the plaintiff Hunter at ease, or, as he said, to pacify him; at another time, that the plaintiff could make no claim under it, intimating that it was a transaction which could not hold. The sheriff seems to have been set at rest by this conduct of Hastings, so much so, that it has been stated that he even forbore to require any indemnity from the plaintiff in the execution. If he was willing to act on his own responsibility in dealing with this claim of Hunter's, he should have borne in mind, that it was not merely what the plaintiff might then choose to say of the bill of sale that he was to consider, but what Hunter might be able to shew was the real character of the

transaction, for it was *his* interest that was at stake ; and it could not be allowed to Hastings, after he had given the bill of sale, to destroy the effect of it at his pleasure, by speaking lightly, and perhaps untruly, of the purpose for which he had given it. However, after Hunter had pressed his claim in vain, and produced his deed, the sheriff went on and sold ; Hunter himself, it appears, buying some few articles at the sale.

Upon the first trial, the case went to the jury upon a charge that they were to weigh all the evidence, and if they thought that the bill of sale was given for a colorable and fraudulent purpose, not really and honestly to secure to Hunter the possession of the goods till his debt was paid, but in order to protect them for the convenience of Hastings, against his other creditors, then they should find for the defendant. If, on the other hand, they should be satisfied that nothing dishonest was intended, then to find for the plaintiff the amount which he shewed to be still due to him, as the balance unpaid of the debt which the bill of sale was intended to secure.

The jury found for the plaintiff, being satisfied, I suppose (as I confess my impression was at the first trial), that nothing dishonest was done or intended by Hunter. We afterwards granted a rule nisi for a new trial, which was made absolute, it appearing to my brothers, that the very fact of the bill of sale being made as upon an absolute transfer of the whole property in the goods, when in fact, as the plaintiff afterwards admitted, the real object was only to create a mortgage upon them, was in itself almost irresistible evidence of fraud, because it was calculated to mislead and prejudice other creditors ; and besides, if the transaction were in truth a sale, then it was a strong badge of fraud that Hastings should have continued always afterwards in possession of the goods, as if he had not sold them ; and they thought that if he could be allowed, upon the trial, to attempt to change the appearance of the transaction by setting up that his deed was in fact a mortgage, though expressed to be a sale, for the purpose of weakening the inference of fraud, which would otherwise arise from

Hastings remaining in possession, still that the evidence which he adduced with that view should be looked upon with great suspicion, as being at variance with the terms of the writing. This was the impression of my brother judges, and I agreed with them in thinking that this part of the case had not been put by me in as strong a light to the jury as it should have been, and it was principally on this ground that we granted a new trial.

The case has in consequence gone before another jury. The evidence does not seem to have differed materially from that given on the first trial; and the jury, receiving from the learned judge who tried it a charge not complained of as by any means unfavorable to the defendant, have found again for the plaintiff, for the same amount as before, adding interest since the time of the last trial.

The defendant has moved for another new trial, on the law and evidence. If it can be considered that there was really anything to be weighed by the jury before they could pronounce the transaction to be fraudulent—in other words, if the question of fraud or no fraud was under the circumstances a question for the jury and not for the court—then, whatever may be our opinion as to the side to which the weight of evidence inclined, the cases are strong against our interposing a second time. Not that there is any inflexible rule upon the subject, for each case must be taken up and dealt with upon a view of all its circumstances; but there are certain leading principles which have great weight in determining the court what course it may be proper to pursue.

When a question is of a kind peculiarly for a jury to dispose of, their judgment cannot be repeatedly overruled in the matter. It does not appear that they have clearly acted in disregard of the law; and the allowing a third trial in such a case, upon the evidence merely, would be in effect subjecting a party to be tried a third time upon an imputation of fraud, when a jury has twice negatived the existence of fraud. There may be cases so glaring as to warrant even such a course. The question is whether this is one of them. —2 Bing. N. C. 554. I cannot say that I think so. There

is no doubt that Hunter's was a perfectly honest debt ; and whatever wishes or intention Hastings may have had as to making any other use of the bill of sale, for deceiving or impeding the other creditors, I do not conclude from the evidence that Hunter intended or desired anything more than to obtain security for a debt of the clearest description. Nothing whatever was included in the bill of sale, except what Hunter had either furnished in the whole or in part, or had bestowed his labour upon ; though Hastings had at the time, in the same house, other furniture, to the amount of many hundred pounds. There is surely nothing more just or reasonable than that a tradesman, who furnishes goods to a housekeeper, should be paid the price of those goods, before they should be sold to satisfy other debts due by the person to whom he is supplying them.

Then again : it was shewn here, by Hunter's whole conduct, that all the use he desired to make of the bill of sale was to secure the payment of the balance due on the account. He did not set himself up as owner of the goods, though his writing imported it. He gave no dishonest appearance to the transaction by the claim which he made under it. He asked only for what was really due upon the articles, which were to be considered *his* till they were paid for. He had a right to insist on that condition, for he need not have furnished the goods without it ; and then Hastings's *other* creditors would not have had them to seize.

What tended to impeach his claim was the bill of sale being as upon an absolute sale which he admitted was not the real truth of the transaction, and that he had always since allowed Hastings to keep possession. These were both badges of fraud : we cannot say they made the transaction inevitably a fraud, so that the jury had nothing to consider but to find fraud, whether they believed there was fraud intended or not. These facts were on this last occasion pressed upon the jury as strong indications of fraud ; but the jury seem nevertheless to have been persuaded that so far at least as Hunter was concerned, there was no fraud in the matter. So far as I have an opinion upon that question of fact, I am inclined to take the same view.

It was said in the argument, and was so stated on the trial, that the deed being in the form of a sale of the goods and not a mortgage, was accidental and not artful; that the instructions were to secure Hunter in the amount of his debt on the goods which he had furnished and worked upon; and that the attorney's clerk who was directed to prepare the writing took the common form which he found in a book of a bill of sale of goods. It is at least a corroboration of this account of the matter that the parties went to a respectable attorney to draw up the writing, and told him the truth. It is consistent also with this account, that when the sheriff seized the goods Hunter only advanced a claim on the goods for the balance due—not a claim to the goods as absolutely purchased by him. And the instrument is on the face of it, also, consistent with this account: for one can there readily see why each article should have had a sum written opposite to it, in many cases being a trifling sum in proportion to the value of the article. As, for instance, the 6*l.* set opposite to sixteen carpets, which I really believe was meant only to declare that Hunter's claim upon them was for his charge for making them up, and that if that were paid he held no further claim on them. This arrangement might be embarrassing in its consequences to other creditors, and less convenient for them than if he had charged his whole debt on some of the articles and had left the others totally free. But I was satisfied on the first trial that it was a natural mode of proceeding, because it was in accordance with truth, and that in that respect nothing dishonest was intended, but the very reverse.

Then, as to Hastings continuing in possession, that has long been held not to be an absolutely conclusive proof of fraud, but only to furnish evidence of it: on which evidence, under all circumstances, the jury must pronounce.

But this fact of Hastings continuing in possession of the goods has led to another objection which was not raised on the first trial, but was raised on the last, and is now insisted upon as a ground for setting aside the verdict—namely, that the plaintiff has sued in trespass and not in trover. If this were a clearly good objection, it seemed to escape

attention on the first trial; and the same objection seems to have escaped attention in a recent case very similar in England, reported in 10 Q. B. R. 101, and not only at the trial but afterwards in banc.

It has not a very fair appearance, though I am sure nothing unfair was intended in this case, when a losing party has obtained, by the interposition of the court, an opportunity of taking his chance with another jury upon a trial of the merits, that he should upon the second trial start a technical objection to the form of action, which was not started upon the first trial, and which would have the effect of withdrawing the case from the jury, after all the expense of both trials has been incurred.

If we were bound to entertain this objection, and decide upon it strictly, then we should have to consider whether this case does come clearly within such cases as *Ward v. Macaulay*, 4 T. R. 489; *Hall v. Pickard*, 3 Campb. 187; *Gordon v. Harper*, 7 T. R. 9; or whether it could be treated as coming within the principle of *Lotan v. Cross*, 2 Campb. 464—for the reason, that if the account which Hastings gave upon the trial be correct, he was not entitled to the possession of the goods for any certain time, as tenant or otherwise, but was merely using them with permission of the owner, who could step in at any time and claim possession. There is room to argue, that in such a case the person in possession has no definite right in respect of which he can claim damages, and that the person really entitled to the possession is the person injured by the trespass.

At present my impression is, that trover was the proper remedy, though certainly, in the late case I have alluded to, the action of trespass was sustained without objection under circumstances the same in effect, and when the objection must have rested on as good ground as the present case.

But considering that this objection was taken for the first time at the second trial, after the court had granted a new trial with a view to a second investigation upon the merits, which such an exception, if allowed, would preclude; considering also, that the objection when made was not reserved for our opinion, but was overruled, and that the defendant

is now moving on the ordinary terms on the law and evidence, I think we are not bound to set aside the verdict upon this technical objection, the only effect of which would be to put the plaintiff to commence a new action, in which he might recover the same damages in another form of declaring.

Per Cur.—Rule discharged.

THE QUEEN V. PATTON—THE QUEEN V. McCULLOUGH—
THE QUEEN V. MORAN.

Clerk of Division Court—Sureties—Liability of sureties to the Crown for monies received by clerk for suitors, and not paid over—Damages, Crown entitled to, on bond—Statutes 4 & 5 Vic. ch. 3, and 8 Vic. ch. 37.

The sureties of the clerk of a division court, having entered into the bond authorised by the acts 4 & 5 Vic. ch. 3, and 8 Vic. ch. 37, are liable upon such bond to the crown for monies collected by the clerk for *suitors* in the court, and not paid over.

Semble, that on the trial of any such action, the crown would be entitled to a verdict for the penalty of the bond, and not only for the sum received for the suitor and not paid over.

Sci. fa. on bond of defendant Patton, given on the 15th of April, 1847, to the Queen, in a penalty of 80*l.*

The bond was set out on oyer. It was a bond of the defendant Patton, as clerk of the Division Court of the 3rd Division of the Simcoe District, and of the defendants in the other two actions, McCullough and Moran, as his sureties, Patton in 80*l.* penalty and the others in 40*l.* each, with a condition, that if Patton should well and faithfully fulfil, perform and discharge, all and every the duties of his said office of clerk of the Division Court, and should duly and regularly keep and render all accounts which, pursuant to the act 4 & 5 Vic. ch. 3, and 8 Vic. ch. 37, ought to be kept and rendered by him; and should account for and pay over to the parties entitled thereto, and particularly to the treasurer for the time being of the District of Simcoe, all such sums of money as should come into his hands as clerk of the said division court, and should make such payment or payments to the said treasurer at least once in every three months, then the obligation to be void."

The defendant Patton, in the action against him, pleaded that he did at all times, after the making of the bond and before this suit, well and truly observe, perform, fulfil and keep, all and singular the duties, articles, clauses, judge

ments, conditions and agreements in the condition specified, according to the tenor and effect, true intent and meaning thereof."

For the Queen, it was replied that the defendant was duly appointed clerk of the Division Court, &c., and that while he was such clerk, viz., on &c., one Whiting recovered against one Robert McKee, in the said division court, a judgment for 2*l.* 19*s.*, which sum was afterwards paid by McKee, or on his behalf, into the hands of the defendant, as such clerk as aforesaid, he, the said defendant, being the proper person by law authorised to receive the same, and to pay the same over to the said Whiting ; and that although the defendant, as such clerk, had and received for the said Whiting the said 2*l.* 19*s.*, yet, though often requested, he hath not yet paid the same, or any part thereof, to the said Whiting, and the said money is yet wholly unsatisfied to the said Whiting, contrary to the duty of the defendant as such clerk as aforesaid, and contrary to the condition of the said writing obligatory.

Many similar bréaches were charged for other sums, recovered by Whiting against other debtors ; the averments of the payment by the debtors to this defendant, and his non-payment over, being precisely the same in each.

The defendant rejoined that he paid to Whiting all the sums of money in the replication mentioned.

The records in the actions against the sureties contained the same pleadings, the issue being upon the payment over by Patton to Whiting of all the monies stated in the replication to have been collected. In each case a verdict was given upon the trial, for the crown, 20*l.* 9*s.*

McDonald, for the defendants, in each case, moved to arrest the judgment, on the ground that no action could legally be brought on those bonds to the crown, given under the statute, in order to recover monies which Patton, the clerk, had received in suits in the Division Court, between party and party, and which monies were of right to be paid over to the plaintiffs in the several suits, and formed no part of the fee fund for which the clerk was accountable to the public, and which he ought by law to have paid into the hands of the treasurer.

Burns shewed cause.

The several clauses referring to the clerks of the Division Court, in the acts 4 & 5 Vic. ch. 3, and 8 Vic. ch. 37, were cited.

ROBINSON, C. J., delivered the judgment of the court.

It seems reasonable to suppose, that it could not have been intended that the bonds to be given by clerks of division courts, under the 19th clause of the 4 & 5 Vic. ch. 3, should be given for the purpose of securing any other than public monies which were to pass through the hands of the clerk, being to be paid by him to the treasurer, and by the latter to the receiver general, under the 11th, 12th and 13th clauses of the act.

It is probable that that was all which the bonds required to be given by the statute were intended to secure; but when we come to examine the act, we find the express provisions do actually go farther, and the language is so plain that we cannot but give effect to it.

The 10th, 11th, 12th, 13th, 15th, 16th, 17th, 19th, 22nd, 30th, 33rd, 34th, 40th, 43rd, 44th, 47th, 50th, 54th, 55th and 56th clauses of the statute are those which require to be considered, for these are all that relate to the duties of the clerk in relation to the receiving and paying over monies.

It is impossible to say, after duly considering them, that the legislature did not intend to make the due care and payment over by him of the monies to be received for suitors a matter of public concern, for the 12th clause expressly compels the clerk to render an account to the treasurer of all monies paid into his hands, or received out of court, *by plaintiffs or defendants*, under any order or process of the court; and the 15th and 17th clauses contain provisions which, under certain circumstances, must have the effect of transferring monies which have been paid to clerks for suitors into the hands of the district treasurer, whose accounts, including such monies, it is declared shall be deemed public accounts, and shall be inquired into and audited as such.

The monies received by the clerk for fines and fees are properly public monies, and would of course be accounted

for as such ; but there seems to be an inconvenient mixing up of public and private monies and accounts in some of these clauses, the object of which it is not easy to understand.

The 56th clause, I think, cannot be taken to apply to the clerks, but only to officers acting under the process of the court in levying monies. If it could be applied to the case of the clerk not paying over monies, as well as to bailiffs, it would afford a strong argument for inferring that the legislature did not intend that suitors should be left to the expensive course of suing in the Queen's name for monies, which that clause would give them much more summary and stringent means of collecting, if the clerk has any means of paying. But the argument even then would not be conclusive, because the bonds were intended to afford a remedy in cases where the clerk might be insolvent, and where the 56th clause consequently might give no redress.

On the whole, although it does seem an inconvenient provision, and is certainly an unusual one, to direct bonds to be given for such a purpose as that for which this bond is now sought to be enforced, yet we think there can be no question that the condition of this bond is authorized by the statute, and that the breach comes within the condition.

The 19th clause enacts "that every clerk who shall receive monies in the execution of his duty shall give security for such sum, and with so many sureties *and in such manner and form as the government of this province shall see reason to direct, for the due performance of his office,* and for the due payment of all *monies received by him under any provision of the act.*" Under this clause, it seems this bond now sued on has been given to her Majesty, by the clerk and his sureties, in a penalty of 80*l.*, with a condition "that he shall well and faithfully perform all the duties of his office, and shall account for and pay over *to the parties entitled thereto,* and particularly to the treasurer for the time being of the district, all such sums of money as shall come into his hands as clerk of the said division court."

It is not a question upon this motion in arrest of judgment, whether there was any necessity for proving upon the trial that this was the form of bond which the government

had directed under the 19th clause. We are to assume that all has been regularly done in that respect. We have no reason to question that the bond, thus sued upon in the Queen's name, has been taken by proper authority.

As a matter of fact, I have observed, that in another action of the Queen v. Matthews, a surety for a clerk of a division court in another district, which has been lately before us on demurrer, the bond set out was of the same description, and taken with the same condition, from which we may assume, that a general form of bond to be taken under the statute has been furnished by the government.

This bond, it is true, is alleged on the pleading to have been taken under an act passed after the 4 & 5 Vic., ch. 3, namely, 8 Vic., ch. 37; and I have looked into that act, under the expectation that it might perhaps contain some provision placing the matter on a more clear and satisfactory footing, but I find it does not, and that it is an error to say that any of these bonds can have been taken under the provisions of that later act.

The 18th clause indeed of that statute (8 Vic.) enacts, "that the fees to be received *under that act for the fee fund*, shall be taken to be *the fees* for which the several clerks and bailiffs, and their sureties respectively, now are or hereafter shall be accountable, by virtue of any bond or securities by them given or entered into, or to be given and entered into in pursuance of the said recited act."

The whole effect of that is, to make the clerks and their sureties, who would have been accountable for the fees appointed by the old act if it had continued in force, accountable for those fees which were substituted for them. It does not limit the operation of the condition of the bonds to fees only, but leaves it in other respects untouched.

Then the condition of this bond can certainly not be held by us to be unauthorized by the 19th clause of the first statute, for it does plainly conform to it. It shews that the *particular* object was to secure the accounting for and paying over of the fees and other monies payable to public uses, but it does also extend to bind the parties that the clerk shall duly perform his duties, and shall pay over *all*

monies received by him under any provision of the act. We cannot hold, on the one hand, that such a condition is unauthorised by the 19th clause; nor, on the other hand, can we hold that it is not a breach of that condition, if the clerk has neglected or refused to pay over to suitors monies which he has received for them. Such misconduct is a clear breach of the general condition to perform the duties of the office faithfully, by which the penalty would at any rate be incurred.

It does not seem to follow necessarily, that on trial of any such action the damages are to be governed by the sums to be paid over to the parties, for that would be assuming that the bond to her Majesty comes within the statute of Will. III., respecting the suggestion of breaches; but we cannot hold that the crown is not entitled to a verdict for the penalty of the bond, whatever it may be found just and convenient to do under the recovery.

I take it the suitor whose monies are detained has his private remedy in such cases against the clerk notwithstanding these bonds being taken; and if, instead of pursuing it, he has in this case been the means of putting this bond in suit, it must be left to him to apply to the government for the fruits of his action. I cannot see how it can be consistent with public convenience to have claims of this description made matter of account with the public; but that is not for our consideration; we have only to say whether the condition of this bond is legal, and whether it is shewn on the pleadings to have been broken.

We think we must answer both questions in the affirmative, and give our judgment discharging the rule for arresting the judgment.

Per Cur.—Rule discharged.

WALLACE v. HENDERSON.

Note payable to maker's own order—How to be declared on—Averment as to time of endorsing.

A note payable to the *maker's own order*, may be declared upon as a note payable to the *bearer*; but to declare upon such a note that he (the maker) made an *instrument in writing* promising to pay to *his own order*, would be bad.

It is bad, on special demurrer, to aver that he (the maker) then—to wit, *at the time of making* this instrument—*endorsed*, delivered and assigned the same to A. B., who assigned it to the plaintiff.

Appeal from the District Court of the District of Victoria.

Declaration.—Endorsee v. maker and endorser of note—“for that the defendant A. B. made his certain instrument in writing, and thereby promised to pay to *his own order* 26*l.* 6*s.* 9*d.* for value received; that the *said* A. B. duly endorsed the said instrument, and delivered the same to the defendant C. D.; and the said defendant C. D. endorsed, delivered and assigned the same, so endorsed, to the plaintiff.

Demurrer.—Because the instrument declared upon not being, from the way in which it was worded, a promissory note till the same had been endorsed by the said A. B., was not a promissory note at the time of the making thereof; and secondly, because, inasmuch as the instrument purported to have been made payable to the maker's own order, and not to himself or any other person certain, it was not a note within the statute or the custom of merchants; and also, because the said instrument was not negotiable, and no action could be brought thereupon by the plaintiff against the defendants. Upon this demurrer, judgment below was given in favour of the plaintiff.

From this judgment the defendant appealed.

Richards for the appeal. *Ross* contra.

The cases cited were—*Brown v. Shaver*, 5 U. C. R. 621; *Hooper v. Williams*, 12 Jurist, 270; *Brown v. DeWinton*, 12 Jurist, 578; *Flight v. WcLean*, 16 M. & W. 51.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that this declaration does not state a good cause of action. If Lawrence Henderson, having made a note (so to call it) payable to his own order, and indorsed it, could therefore be treated as the maker of a note payable to bearer, then he should have been sued as the maker of such a note, and the facts being proved would have supported the statement. But here we are told, first, that *he made an instrument* in writing promising to pay to his own order in seven months 26*l.* 6*s.* 9*d.*; in other words, that he bound himself to nobody, to pay to anybody that he would afterwards name, so much money. That is not a statement of any undertaking that can be legally binding.

Then we are next told, that he then, to wit, at the time of making this instrument, indorsed, delivered and assigned the same to George Henderson, who assigned it to the plaintiff. He might certainly have made this instrument and indorsed it on the same day, but how he could make it and indorse and assign it at the same instant I do not understand. He must have made the instrument before he could have indorsed or assigned it, and the narrative of the transaction implies that, although it was said that both were done at the same time, which is repugnant to the rest of the statement.

None of the modern cases cited, in our opinion, would bear us out in holding, that a man may indorse and assign such a writing as is stated here, so as to give a right to a person as his indorsee or assignee to sue upon it.—12 Jur. 290, 678; 16 M. & W. 51; 10 Q. B. R. 805.

We therefore think the judgment should be reversed, and the defendant should have judgment on the demurrer.

Per Cur.—Judgment below reversed.

SMITH V. AUBREY.

Replication—Avowry—Nil habuit replied by a stranger.

A stranger, whose goods have been seized on the premises of a tenant and distrained for rent, cannot, any more than the tenant himself, question the landlord's right to demise.

Smith complained, in this action of replevin, of Aubrey having seized his goods.

Aubrey avowed as upon a distress for rent due, under a demise made by him to George and William Gray. Smith, the plaintiff, replied, that at the time of making the demise one Ann Field was seised of the premises in fee, and that Aubrey had no estate or interest whatever in the premises, which he could demise, &c.

The defendant demurred, insisting that a stranger, whose goods being on the premises demised had been distrained for rent, could no more plead *nil habuit* than the tenant could, being equally estopped by the tenant's acceptance of the lease and enjoyment under it.

Leith for the demurrer. *Cameron* contra.

The cases cited were—Holt's N. P. 489; Syllivan v. Stradling, 2 Wils. 208; 2 Saund. 285, note (r).

ROBINSON, C. J., delivered the judgment of the court.

No authority has been cited in support of the plea demurred to, and we have no doubt it is bad.

The case of Syllivan v. Stradling decides it, for the plea was pleaded under the same circumstances—that is, by a stranger whose goods were seized; and the court seem to pay no attention to that circumstance, but treat the plea as if pleaded by the tenant—that is, I mean, as fully within the same principle; and it must be so in reason, for otherwise a convenient door would be open to a contrivance for evading payment of the rent in cases where there might be some flaw in the landlord's title.

A stranger of course cannot question the right to demise in such a case, if the tenant cannot. The actual enjoyment of the premises estops the tenant; and if, as regards him, the rent must be conclusively taken to be due, then the right of distress upon the premises out of which the rent issues must follow of course.

If this plea were good, then there might be a case in which the landlord would have a right of distress, but yet could only take such goods as were the property of his tenant; a distinction for which we could cite no authority.

Per Cur.—Judgment for the plaintiff on demurrer.

CONSUMERS' GAS COMPANY V. NICOLLS.

Statute 11 Vic. ch. 14—Consumers' Gas Company of Toronto—Assumpsit—Averments in declaration.

Under the statute 11 Vic. ch. 14, the Consumers' Gas Company of Toronto may sue *in assumpsit* for calls; the remedy is not confined to debt. In so declaring *under the act*, an averment of consideration to support the promises is not necessary; neither is it necessary to lay the promise to pay on any *certain day*. The general terms, that the defendant *afterwards* promised to pay, is sufficient.

Declaration—Assumpsit.—For that whereas the defendant heretofore, to wit, on the 10th day of November, 1848, was, and for a long time previous thereto had been, and still is, the holder of divers, to wit, ten shares in the stock of the said company; and being such holder, then was and still is indebted to the plaintiffs in 56*l.* 5*s.* of lawful money

of Canada, the same being the amount of divers, to wit, five calls before then made and payable, in respect of each of the said shares of the defendant. By reason whereof defendant became liable to pay to the plaintiff the amount of the said calls, by force of the statute in that behalf, on request, and being so liable afterwards (objected that there should be a day named here) promised the plaintiffs to pay them the same. Yet he hath not paid the same, or any part thereof, to the plaintiff's damage of 100*l.*, and therefore they bring suit, &c.

Demurrer.—Because the declaration sets forth or discloses no good or sufficient consideration to support an action of assumpsit, and because the plaintiffs should have sued the defendant in an action of debt; also for, that it is not stated in the said declaration, when the said calls therein mentioned were made, nor are the facts set forth with sufficient certainty of time and as in a special action of assumpsit they should be.

Eccles for the demurrer. *Hagarty* contra.

The authorities cited were — 2 Chit. Pl. 44; 1 Chit. Pl. 118; *Simpson v. Johnson*, Dougl. 10, 387; *Rann v. Green*, Cowp. 475; the *Southampton Dock Company v. Richards*, 1 M. & Gr. 448.

ROBINSON, C. J., delivered the judgment of the court.

We see no reason why assumpsit should not be brought under the statute 11 Vic. ch. 14, for calls, though undoubtedly the action under similar statutes is more commonly in debt.

The statute itself does not confine the remedy to debt, but provides that the calls, when not paid, may be sued for in any court having competent jurisdiction; and in giving a general form of declaring, it allows the plaintiff to state that the defendant is the holder of certain shares, and that he *is indebted* to the company in the sum to which the calls in arrear may amount.

That is quite consistent with the action, being one of *indebitatus* assumpsit. The claim is wholly founded on contract; the defendant, by subscribing, engages to pay to the company the money subscribed, in such instalments as

they may call for. The short and convenient form of declaring given by the statute enables the plaintiffs, without prolixity, to shew in general terms a certain sum due for calls; and I can see no possible objection to the plaintiffs availing themselves of that form of declaring, when they mean to lay an assumpsit to pay the debt thus ascertained, as well as when they mean to declare in debt.

In Chitty's Pleadings, vol. 2, p. 44-5, there are many precedents of declarations in assumpsit for calls, where I suppose the statutes were similar to this. And he concludes, that though a statute may in some respects be considered as a specialty, yet assumpsit may be supported for money, &c., accruing due to the plaintiff under the provisions thereof, when he is not thereby restricted to any other particular remedy.—1 Chit. Pl. 118; Dougl. 10, note A; Bac. Abr. Assumpsit.

In *Rann v. Green*, Cowper, 475, Lord Mansfield says: "Here the action, which is an action of assumpsit, is brought in consequence of a right liquidated by means of the statute. The statute therefore is the only ground of action. Without it we had no authority to make the order we did; but when the order was made, the law raised an assumpsit."

Then the plaintiffs, being at liberty, as we think they were, to sue in assumpsit, we must look on this as an action brought under the authority of the statute, and to which therefore its provisions apply, so far as they are applicable. An averment of consideration was not necessary (the want of which is one of the objections taken), because the statute creates the debt, and that is the consideration for the promise.

Then as to the exception that the facts are not set forth with sufficient certainty of time, the statute expressly dispenses with the necessity of setting forth the facts specially, and says that it shall be sufficient to allege what in this case is alleged.

The only exception about which it seems to me there can be a question, is that on which it appears the defendant chiefly relies, and which is one purely of form—namely,

that the plaintiffs have not laid the promise to pay to have been made on any certain day, but in general terms, "that the defendant *afterwards* promised to pay."

The defendant's argument is, that though the plaintiffs are entitled by the statute to allege the existence of the debt in such general terms as they have done, and if they had contented themselves with suing in debt for that debt, no thing more would have been necessary, yet that they have travelled out of the form in laying an assumpsit, and therefore, as to that part of their declaration, they have not the aid of the statute and must abide by the common rules of pleading.

I observe, on referring again to the short forms which are given by Mr. Chitty of declarations in assumpsit for *calls*, that the promise is laid on a particular day. But when it is determined that the statute admits of declaring in this form of action, and enacts that it shall not be necessary to set forth the *special* matter, and describes what it shall be sufficient to allege, the question is, whether it is consistent with the spirit or design of such a statute to declare a declaration bad on special demurrer, because it does not conform to precedents in a particular on which the statute is silent, but omits something which is in the strictest sense matter of form, being the mere supposed time of a promise which was never in fact made at any time; but is merely imaginary, being implied by law.

Per Cur.—Judgment for the plaintiff on demurrer.

KENDRICK V. MAXWELL.

Declaration—common count: "For that whereas the defendant, on the 12th of July, 1849, was *indebted* to the plaintiff in 100*l.*, for meat, drink, washing and lodging, goods, chattels and other necessities, then found and provided for one Elizabeth Maxwell, and at the defendant's special instance and request."

On motion to arrest the judgment on the following grounds—1st, that it was not alleged that the goods, &c., were found *by the plaintiff*; 2ndly, or that they had been provided *upon the credit* of the defendant: *Held per Cur.*, declaration good after verdict.

Semble, that the first objection would have been good on special demurrer.

Verdict for the plaintiff, 27*l.* 10*s.* damages on the first count.

The count ran thus: "For that whereas the defendant,

on the 12th July 1849, was indebted to the plaintiff in 100*l.* for meat, drink, washing and lodging, goods, chattels and other necessities, then found and provided for one Elizabeth Maxwell, and at the defendant's special instance and request."

The defendant obtained a rule to arrest the judgment on the following objections: 1st, that it was not alleged that the goods, &c., were found *by the plaintiff*; 2ndly, that it was not alleged that they had been provided upon the credit of the defendant.

A. *Wilson* obtained a rule to arrest judgment on the first count: he cited—*Victors v. Davies*, 12 M. & W. 758; *Marriott v. Lister*, 2 Wil. 141; *Davies v. Wilkinson*, 2 P. & D. 357; *Fenton v. Ellis*, 5 Taunt. 192; *Butcher v. Andrews*, 1 Salk. 23; *Courtney v. Strong*, 1 Salk. 364; *Thorpe v. Stallwood*, 3 M. & Gr. 960; *Coppinger v. Beaton*, 8 T. R. 338; *Taylor v. Forbes*, 11 E. R. 315.

Eccles shewed cause: he cited—*Child v. Pierce*, 10 Mod. 331; *Emery v. Fell*, 2 T. R. 30; *Williams v. Wellington*, 1 H. Bl. 86.

ROBINSON, C. J., delivered the judgment of the court.

The question is, whether this case comes within the principle of the decisions in *Butcher v. Andrews*, 1 Salk. 23, and *Marriott v. Lister*, 2 Wils. 141; and it is clear, we think, that it does not; for this is not a claim as for goods *sold* or money *lent* to a third party—in which, it is said, the very terms *sold* and *lent* import a contract between the plaintiff and the third party, and shew that such third party is debtor upon the transaction, and that the defendant could only be chargeable as upon a special contract to guarantee the payment. But here the necessities are laid to have been provided for Elizabeth Maxwell, at the defendant's request; which statement, in our opinion, makes the defendant the only debtor, as in the case of goods delivered to a third party at the request of a defendant, in which case they may be sued for under the common counts, as sold to the defendant.

It is not necessary, in such a case as this, to say expressly that the necessities were provided upon the

credit of the plaintiff; for if they were *provided for* the third party, *at the plaintiff's request*, they were, for all that appears, provided upon the plaintiff's credit, since a man is bound to pay for necessaries provided at his request for a third party, he being in truth the purchaser, and the person to whom the credit is originally given on such a statement of the transaction.

But then, it is objected, that it does not appear on this record that the goods, board, &c., were found and provided *by the plaintiff*. It ought to have been so stated; but whether the omission is fatal after verdict, is another question.

The cases in which such an omission has been held to make an affidavit of debt insufficient are not in point, because the courts, in favour of liberty, require strict regularity in affidavits to hold to bail. We are of opinion, that after verdict this declaration is sufficient, notwithstanding the objection last noticed; for that the reasonable intendment is, that the plaintiff found and provided the goods—otherwise it could not be true that the defendant is indebted *to him* for the goods, &c., as is stated. It is therefore sufficiently implied in the word indebted; and the jury could not have given a verdict against the defendant for the necessaries found, unless they had seen that it was the plaintiff who provided them.

It is not always easy to mark the line of distinction between a defective case and a case defectively stated; which latter class of cases alone, it is said, can be helped by verdict. Nor, I confess, have I been able to see clearly the force and meaning of the distinction in these words, which have been so often quoted, for *de non apparentibus et non existentibus eadem est ratio*; and if, in the absence of some substantially necessary statement, a case must be admitted to be defective, then I do not see clearly how we can avoid admitting that it stands upon the record a defective case.

If from what is stated we can see certainly that the plaintiff cannot have a good cause of action, then we can pronounce decisively that he has a defective case; but if all that we can say is, that he may or may not have a good cause of action, according as certain facts, about which no

thing is said, did or did not exist, then it does seem an extremely difficult matter to lay down any intelligible and precise rule by which we shall be authorised to assume, after verdict in some cases, that what is not asserted in the record must nevertheless have been proved, and so give the plaintiff the benefit of that presumption; while in other cases we refuse to allow the benefit of such a presumption to support his case, defective on the record.

But, applying the rule as well as we can, with no disposition to facilitate exceptions after verdict, I think we must hold that the exception last stated is not fatal after verdict. The principle of *Coppinger v. Beaton*, 8 T. R. 338, applies to this objection; and in *Taylor v. Forbes*, 11 E. R. 315, and similar cases, where the same objection was taken that is urged here, we can see clearly, I think, that in giving effect to it in cases of affidavits for arrest the court have been entirely actuated by the necessity of observing forms strictly in proceedings relating to personal arrest; and the caution and doubts expressed even in those cases, make it evident that the courts would have held the same objection cured by verdict, as in *Child v. Pierce*, 10 Mod. 331.

Per Cur.—Rule discharged.

BROWN V. RUTTAN, SHERIFF.

Notice of landlord to sheriff to save year's rent—What sufficient—Effect of landlord's joining in bond that the goods distrained should be forthcoming for the purpose of being sold upon the fi. fa.—Of his distraining as landlord, subsequent abandonment of distress, and bidding at the sale.

A verbal notice from the landlord to the sheriff will be sufficient to save the year's rent; and if it can be shewn that the sheriff knew of the rent being due, a formal notice from the landlord would not be necessary.

The circumstance of the landlord having joined in giving a bond that the goods distrained should be forthcoming, for the purpose of being sold upon the *fi. fa.*, will not prejudice his claim for rent; neither will his claim be prejudiced by his having distrained as landlord, and by afterwards having abandoned the distress; nor even by his bidding at the sale of the goods.

Case for levying on the goods and chattels of one Parks, tenant to the plaintiff, and removing them without satisfying a year's rent then due to the plaintiff, viz., 45*l.*, due on 24th December, 1848, though the defendant had notice of such arrear of rent.

Pleas.—1st. Not guilty.

2nd. Denying that Parks was tenant to the plaintiff, in manner and form, &c.

3rd. No rent in arrear.

4th. Denying notice.

The plaintiff proved a written demise under seal from him to Parks of the north half of lot 18 in the 1st concession of Clarke, 100 acres, to hold for three years from the date ; by which also he agreed to let to Parks a yoke of oxen with the land for the first year, and a span of horses for the second and third years, Parks binding himself to pay 35*l.* a year for the land and 10*l.* a year for the use of the teams, the rent to be paid on 24th December in each year.

It seemed that Parks was a good deal in debt, and it was surmised at the trial that the lease was merely colorable, and intended to protect Parks by setting up the appearance of the relationship of landlord and tenant. Nothing was proved respecting the title to the 100 acres.

Parks swore that he entered under the lease, and enjoyed till the first year's rent fell due, the 24th December. On the 28th, the sheriff's bailiff went to the premises and seized a large quantity of hay, and some live stock and furniture. Before the sale, the plaintiff gave verbal notice that a year's rent was due to him on the 24th December, both to the bailiff and to the deputy sheriff. The plaintiff joined with Parks in a bond in the usual form to the sheriff, to secure the re-delivery of the things seized when required. They were sold a few days afterwards. The plaintiff himself bought a few things at the sale, and bid for the hay, but was not the highest bidder. That was bought by the agent of the plaintiff in the *fi. fa.* and was afterwards taken away by him. It brought 32*l.* 10*s.*

After the bailiff had seized the goods under the *fi. fa.*, the plaintiff took out a warrant of distress for his rent ; but finding that the goods, being in the custody of the law, could not be distrained upon, he abandoned it, saying that he would give notice to the sheriff under the statute.

He claimed only 35*l.* as his year's rent, and it was proved that goods to that amount and more were sold upon the execution.

The learned judge left the case to the jury, who found for the plaintiff, 35*l*.

It was objected at the trial, that the bond given by the plaintiff to secure the safe keeping of the goods seized estopped him.

2ndly. That the plaintiff having distrained, his subsequent abandonment would not restore his right to look to the sheriff.

Cameron, Q. C., obtained a rule for a new trial on the law and evidence, and for misdirection. *Richards* shewed cause.

The authorities cited were—*Andrews v. Dixon*, 3 B. & Al. 645; *Smallman v. Pollard*, 1 D. & L. 901; *Smallman v. Pollard*, 6 M. & Gr. 1001; *Stephen's Pl.* 252; 1 Saund. 325, note (a); *Arch. L. & T.* 243.

ROBINSON, C. J., delivered the judgment of the court.

We see nothing that should lead us to set aside this verdict. The deputy sheriff seems to have been under the impression that a written notice from the landlord was necessary, but that is a mistake; a verbal notice is sufficient; and indeed it will be sufficient if it be clearly shewn that the sheriff knew of the rent being due, though he may not have received a formal notice from the landlord.

The circumstance of the landlord having joined in giving a bond that the goods should be forthcoming for the purpose of being sold upon the *fi. fa.*, cannot prejudice his claim under the statute 8 Anne, ch. 14, for the sheriff had a legal right to sell under the *fi. fa.*, and the landlord had a right to be paid his rent out of the proceeds of the sale, before the goods should be removed. There was no inconsistency in his doing any act in affirmance of the sheriff's right to seize and sell, because that right was clear; and nothing could be considered as compromised by the landlord, when he entered into the bond for the safe keeping of the goods.

Then as to the plaintiff having distrained as landlord and afterwards abandoned the distress, and even bidding at the sale, that only shewed that he submitted to the law. He could not have held on by his distress, in opposition to the execution which had before attached, and he therefore pro-

perly gave up the attempt to do so, and contented himself with claiming his year's rent out of the proceeds of the goods sold.

There was enough bid by the plaintiff on the *fi. fa.* to cover the rent; and the sheriff, contrary to the statute, let him remove the hay, leaving the plaintiff's rent unpaid.

It has been surmised that there was a collusion between the plaintiff and Parks to set up a mere pretended demise, in order to cover the property to a certain extent, for the benefit of Parks, but we can trace no proof of this in the evidence. There is no proof that the 100 acres leased were not really the property of Brown, or that Parks was not actually and *bona fide* his tenant, as the lease imports.

It may have been all a fraudulent contrivance, but we cannot act upon mere surmises.

We think the rule must be discharged.

Per Cur.—Rule discharged.

ROSSIN ET AL. V. McCARTY ET AL.

Plea to a note setting out certain facts denying in effect the indorsement to the plaintiffs—and therefore bad, as being argumentative.

It is no objection to the validity of a note, that at the time it was endorsed to the plaintiffs it had not in fact been signed by the maker: the subsequent filling up of the maker's name—or of the amount—or of a payee's name, will be treated as if made before the endorsement.

Where it is pleaded that both A. (the maker of the note) and the plaintiffs knew at the time that the note was transferred by A. (the maker) to the plaintiffs, that B., the indorser, (who had indorsed the note before it was signed by the maker), had only agreed and intended to endorse a note that was to be made by C., and not one made by A.: *Held per Cur.*, that such a plea denied in effect the indorsement to the plaintiffs, and was therefore bad as being an argumentative plea.—(SULLIVAN, J., *dissentiente*.)

Declaration.—Indorsees against William McCarty as maker and John McCarty as indorser of a note.

Plea.—That there was not at any time any consideration or value for the defendant John McCarty endorsing the said promissory note in the said first count mentioned, or paying the amount thereof or any part thereof; and that the said promissory note was indorsed by the defendant John McCarty in blank, and before the same had been signed by the said defendant William McCarty, as the maker thereof, and was afterwards, to wit, on the 1st of October, 1848, before the same had been or was so signed

by the said William McCarty as aforesaid, delivered by the defendant John McCarty to the defendant William McCarty for a special purpose only, to wit, that the said William McCarty should procure the same to be signed by one Jeremiah Lapp as the maker thereof, and then, and when the same should be or should have been so signed by the said Jeremiah Lapp, to procure the same to be discounted for the benefit of the defendant John McCarty. And the said John McCarty further saith, that the said William McCarty then took and received and from thence, until the plaintiffs became possessed of the same as hereinafter mentioned, held the said promissory note for the special purpose aforesaid. And the defendant John McCarty further says, that the said William McCarty, in violation of good faith, and contrary to the said special purpose for which he so received and held the said promissory note as aforesaid, heretofore, and whilst he so held and had the same in his possession for the special purpose aforesaid, to wit, on the said 1st of October, in the year last aforesaid, fraudulently, and without the authority of the defendant John McCarty, and with intent to defraud the defendant John McCarty, negotiated and parted with the said promissory note for his own use and benefit, and then delivered the said note, so indorsed as aforesaid, to the plaintiffs. And the defendant John McCarty further says, that the said promissory note was not at any time indorsed to the plaintiffs, otherwise than by the said William McCarty so delivering the same so indorsed by the defendant John McCarty as aforesaid to the said plaintiffs. And the said John McCarty further says, that the plaintiffs, at the time when the said promissory note was so delivered to them as aforesaid by the said William McCarty as aforesaid, had notice of the premises, and well knew that the said William McCarty had no authority or right to negotiate or part with the same on his own account; and that there was not at any time any consideration or value given in good faith for the said indorsement of the said promissory note to the plaintiffs, as in said first count mentioned; and this the defendant is ready to verify, &c.

Demurrer.—Because the plea was an argumentative denial of the indorsement of the note to the plaintiffs, and was also double.

Wilson and *Read* for the demurrer. They cited—*Mars-ton v. Allen*, 8 M. & W. 494; *Brind v. Hampshire*, 1 M. & W. 372; *Leaf v. Robson*, 13 M. & W. 651; *Shepperd v. Shepperd*, 1 C. B. 854; *Wright v. Watts*, 2 G. & D. 386; *Adams v. Jones*, 12 A. & E. 455; *Hayes v. Caulfield*, 5 Q. B. R. 81

Cameron, Q. C. contra. He cited—*Eden v. Turtle*, 10 M. & W. 635; *Evans v. Kymer*, 1 B. & Ad. 529; *Delauney v. Mitchell*, 1 Stark, 439; *Snaith v. Mingay*, 1 M. & S. 87.

ROBINSON, C. J.—The plea demurred to here states a defence so inconsistent with any legal or just right in the plaintiffs to recover, that I should have thought the plaintiffs would have been content to take issue upon it rather than take fourteen exceptions to it on special demurrer, most of which exceptions are clearly not entitled to prevail.

The plaintiffs, however, may allege—and that may be their reason, or at least one of their reasons for demurring—that, as the plea might be held by the court to amount to a denial of the fact of indorsement, they could not venture safely to take issue upon it by replying *de injuriâ*; and yet, as it stands, they could not conveniently answer it without subjecting the replication to a charge of duplicity.

One of the exceptions taken is, that the plea does in fact traverse the indorsement to the plaintiffs, though argumentatively, and that on that account the plea is bad. It is so, in my opinion; for the facts pleaded do not merely charge that William McCarty having received a note indorsed by the defendant John McCarty, to be made use of for a certain purpose, fraudulently applied the note to another purpose. There are several such cases in the books, and under such circumstances the defendant does not in fact deny his indorsement directly or indirectly. Here, I think, he does; not indeed that he denies the bare writing of his name, but that he indorsed the note to the plaintiffs, which means something more than that—8 M & W. 494.

In several cases reported in the books, the defence,

though it is somewhat of this character, yet differs in one very material particular. In general the defendant does not complain that the note itself is anything different from what it was understood or intended to be ; but merely that an improper use has been made of it contrary to the intention, and against the will of the party charged.—This plea goes further.

No difficulty is occasioned by the note not being in fact signed by the maker, and therefore being in fact no note at the time it was indorsed. For the convenience of commerce, it is allowed that notes may be made and indorsed in this irregular manner, and that a man may indorse or may accept an imperfect paper which may afterwards be filled up with any amount, and may have parties names inserted as payees or signed as maker of the note, and such filling up and signature will be treated as if made before the acceptance or indorsement, which, in fact, preceded them.—In *Snaith v. Mingay*, 1 M. & Sel. 87, this is fully admitted, and we know it to be every day's practice among commercial men.

If this defendant had given his indorsement to William McCarty, with a general authority to procure any one he could to sign it as maker, and then to discount it for his benefit, the case would have been very different.

It is averred in the plea, that the note was indorsed with the understanding that one Lapp was to sign it as maker, and then Wm. McCarty was to get it discounted. For all that we know Lapp may have been a debtor of the defendants who had consented to make the note, and to meet it when due, and who might have been well able to do so ; and the defendant might have been quite willing to have such a note created and negotiated, and to be held liable as indorser of it, when he would have been entirely unwilling to put into circulation with his indorsement a note signed by Wm. McCarty, who might neither be willing nor able to make any provision for paying it, and who, if he should pay it, would claim to be reimbursed.

Wm. McCarty stands in no other light than an agent employed *pro hac vice* merely—he is not shewn to have

been an agent with a general authority to bind John McCarty by his acts. What he does therefore out of the scope of his authority, and in direct opposition to it, is void.

The principle is clearly stated in *Fenn v. Harrison*, 3 T. R. 757. If he had taken the paper to Lapp as he was instructed to do, and had got his signature as maker, and then discounted it, no doubt John McCarty could not have disputed the validity of his indorsement, and could not have refused to pay any persons who had taken the note, paying value for it, and without notice of anything improper, even although W. McCarty might have fraudulently misapplied the money. In such a case, the indorsement would have been looked upon as being placed on the note after it had been signed by the maker, because the note itself would have been such as was intended, and the whole irregularity would have consisted in the use made of it.

But these plaintiffs could not hold John McCarty liable as having indorsed the note to them, if it be true, as pleaded, that both Wm. McCarty and these plaintiffs knew, at the time that the note was transferred to the plaintiffs, that John McCarty had only agreed and intended to indorse a note that was to be made by Lapp, and not one made by Wm. McCarty. If the circumstances were known to both J. McCarty and the plaintiff, then they were conspiring to create such a contract for him as they knew he never intended, and that would have been a fraud upon him.

The case of *Adams v. Jones*, 12 Ad. & Ell. 455—shews, I think, that this plea goes the length of denying the indorsement, and that the plea is also bad for duplicity.

McLEAN, J., and DRAPER, J., concurred in opinion with the Chief Justice. SULLIVAN, J., *dissentiente*.

Per Cur.—Judgment for the plaintiffs on demurrer.

BYRNES V. WILD & ELLIS.

Magistrate—Notice of action—Evidence of service of notice—Variance between proof of the cause of action and that described in notice.

Held per Cur., that the following evidence of a bailiff, as to the service of a copy of the notice of action against a magistrate—"He and two other persons held the respective papers while they were read and compared; but having allowed the

plaintiff's attorney to keep in the mean time the original, with which the copies were thus compared, and having omitted to place any mark on it by which he could identify it, he could not venture to swear with certainty, on the trial, that the papers which he served were copies of that document"—was sufficient to go to the jury to prove a service.

In an action against a magistrate, a plaintiff is not bound to prove every trespass that he has described in his notice; he may prove what he can, and recover for what he proves, provided it is such an injury as is stated in the notice.

Declaration.—Trespass for seizing a horse and a mare of the plaintiff's.

The defendants pleaded separately the general issue, by statute.

The defendants were justices of the peace for the district of Gore, and made their warrant to a constable, to levy on the plaintiff's goods a fine for obstructing a highway.

At the trial, the plaintiff attempted to prove service of a notice of action, which stated the cause of action thus: "For that you, on the 7th, 13th and 17th days of the month of June last past, at the Ox-bow-bend in the township of Brantford and district of Gore, caused certain goods and chattels, to wit, one bay horse and one bay mare, the property of and belonging to the said John Byrnes, to be unlawfully seized, detained, taken possession of and sold, and other wrongs to the said John Byrnes there did against the peace, &c., to the damage of the said John Byrnes of 200*l*."

The constable who served the copies of the notices had not made any mark on the original, by which he could identify it as the notice of which he had served copies. He swore at first positively that he had served copies of the notice produced; but afterwards explained, that he and two other persons examined the copies *with an original, which he thinks was that produced, but he cannot be certain*. The original, it seems, had remained always in the possession of the plaintiff's attorney.

A nonsuit was moved, on the ground that the service of copy of notice was not sufficiently proved; and 2ndly, That the notice was not sufficiently certain, being of a cause of action for seizure of a horse and a mare on three several days, the 7th, 13th and 17th June; and the horse was proved to have been seized in the town of Brantford, not in the township; and the mare was not seized on the 7th, but

on the 13th June ; and the two were seized and sold on different days, not both taken on any one day named.

The learned judge considered that the evidence did not shew such a case as was stated in the notice, and directed a nonsuit.

Cameron obtained a rule to set aside the nonsuit, and for a new trial on the law and evidence. *Martin* of Hamilton shewed cause.

The authorities cited were—*McGrath v. Cox*, 3 U. C. R. 332; *Gathercole v. Miall*, 15 M. & W. 318; *Fryer v. Gathercole*, 13 Jurist, 542.

ROBINSON, C. J., delivered the judgment of the court.

With respect to the point which has been raised upon the proof of service of copy of the notice of action on each defendant, the bailiff swore on the trial, in general terms, that he had served a copy of the notice *which* the plaintiff's attorney produced at the trial. He and two other persons, he said, held the respective papers while they were read and compared ; but having allowed the plaintiff's attorney to keep in the mean time the original, with which the copies were thus compared, and having omitted to place any mark on it by which he could identify it, he could not venture to swear with certainty, on the trial, that the papers which he served were copies of that document. Still the learned judge did not nonsuit upon that point, but upon the other.

We think the proof of service of copy of notice was such as was rightly allowed to go to the jury, and that we should not now order a nonsuit upon it. In a case of *McGrath v. Cox*, in this court, we referred to a case of *Gathercole v. Miall*, since reported in 15 M. & W. 318, in which the language of Pollock, C. B., supports us in saying that there was in this case evidence to go to the jury of the service of copy of notice of action. They might not have been satisfied with it, and might have found for the defendant, and we might perhaps have found no fault with their doing so, but that is a different question from the right to direct a nonsuit, as if there had been no evidence to prove the service of a copy, especially, as was remarked by Lord Eldon,

in a similar case in *Jory v. Orchard*, 2 B. & P. 41, the paper delivered being in the hands of the defendants, it was in their power to contradict the evidence by producing the copies served, if they varied.

It would greatly embarrass the administration of justice to be unreasonably strict in questioning bailiffs as to the certainty of the papers which they have served being true copies. We know that, in practice, a strict cross examination on that point is waived, and for the obvious reason I have just mentioned—namely, that if there is a variance the defendant can easily shew it.

Then as to the principal point on which the learned judge did direct a nonsuit—namely, that the evidence did not shew such a cause of action as was stated in the notice—we think, on consideration, that there was a misapprehension on that point.

The notice stated the complaint to be that the defendants had, on the 7th, 13th and 17th days of June, at the Ox-bow-bend in the township of Brantford, caused a horse and mare of the plaintiff's to be unlawfully seized, detained, taken possession of and sold.

As regards the horse, the notice did not state the facts truly, for he was not taken or detained anywhere but in the town of Brantford, and not at the other place named; therefore for him the plaintiff could not recover from this error in his notice, but he might nevertheless recover for taking the mare. The notice and the evidence sufficiently agree, we think, as to that part of the plaintiff's case; the place was rightly described in the notice. There were not trespasses proved in respect to the mare on all the days named, but only on two of them; but a plaintiff is not held to prove every trespass that he has described in his notice; he proves what he can, and may recover for what he proves, provided it is such an injury as is stated in the notice.

We are therefore of opinion that the nonsuit should be set aside and a new trial granted, without costs.

Per Cur.—New trial without costs.

QUEEN'S BENCH.

JUDGMENTS DELIVERED IN MICHAELMAS TERM, NOV. 1849.

Present—THE HONORABLE J. B. ROBINSON, C. J.

“ MR. JUSTICE MACAULAY,

“ “ McLEAN,

“ “ SULLIVAN.

THE HONORABLE MR. JUSTICE DRAPER in the Practice Court.

GILLESPIE ET AL. V. BRITISH AMERICA FIRE AND LIFE
ASSURANCE COMPANY.

Marine policies—construction of—Issues raised on the care and skill of the captain in navigating the river St. Lawrence—Seaworthiness of the vessel—how far to be considered with reference to the particular navigation in which the loss of vessel occurred—express and implied conditions.

The plaintiffs (the assured) sued the defendants (the insurers) upon a marine policy, for the loss of a vessel by stranding while navigating the river St. Lawrence. The jury, upon issues raised under the exceptions in the policy, as to the negligence and carelessness of the captain and crew in navigating the vessel upon the waters of the St. Lawrence, by which it was alleged that the loss of the vessel had occurred, and not by the ordinary perils of the navigation, found for the defendants; and *Held per Cur.*, upon a motion for a new trial, that upon the evidence (as given below in the statement of the case), the finding of the jury, could not be disturbed.

Seemle, that with respect to the cargo insured, as well as to the vessel itself, a marine policy may, by an express (though *not by an implied*) agreement, become legally invalid, from the want of care and skill on the part of the captain and crew in navigating the vessel; and *Seemle*, that the wording of this policy amounted to such an express agreement.

Seemle, that upon the general principles of law applicable to the construction of marine policies, the seaworthiness of a vessel is a fact to be considered with reference to the *particular navigation* in which the loss of the vessel may occur—as, for instance, if a vessel insured between Toronto and Quebec were lost by stranding in the river St. Lawrence—the question for the jury to determine would be, not was she well found and seaworthy for the navigation of the open Lake Ontario, but was she well found and seaworthy for the navigation of the river St. Lawrence; and if in the opinion of the jury she was suitable for the river navigation, though clearly not so for the lake, the policy will not be vitiated, unless it be so framed as to leave no doubt that the intention of the parties was to make the unseaworthiness of the vessel, for *either navigation*, without reference to the particular navigation in which the loss should occur, an absolute cause of forfeiture.

The plaintiffs, Gillespie & Co., sued the defendants on a policy of assurance on a cargo of flour from Port Credit to Quebec, shipped on board the steamer Princess Victoria.

The declaration stated the loss to have arisen from the vessel being stranded upon an island in the river St. Lawrence, above Brockville, whereby she became leaky, and

the flour was wet and damaged, and a small portion of it wholly lost.

The policy was in the form of those said to be ordinarily given by the company, and was expressed on the face of it to be "subject to all the forms, conditions, provisions and exceptions contained in the policies of the company, a copy of which was printed on the back."

Among these provisions and conditions printed on the back was the following: "Touching the adventures and perils which the British America Fire and Life Assurance Company is content to bear and take upon itself, they are upon the lakes, rivers, jettisons, fires, and all other perils, losses and misfortunes that shall come or happen, to the hurt, detriment, or damage of the said property, *excepting perils, losses and misfortunes arising from and caused by ice, theft, barratry, or robbery, or from want of ordinary care or skill, such as is necessary and proper on such voyages and in said navigation, in lading or navigating said vessel,* and excepting also all losses arising from *or caused by the said vessel being unseaworthy, or unduly or improperly laden, on the voyage or trip aforesaid.*"

The declaration, after describing the manner of the loss, averred that the said loss and damage did not happen or was caused by any perils, losses, or misfortunes arising from or caused by ice, &c. (following the words of the exception indorsed on the policy), *or from want of ordinary care or skill, such as was necessary and proper on such voyages and in said navigation, in lading or navigating said vessel, nor by any accident arising from or caused by the said vessel being unseaworthy or unduly or improperly laden, on the voyage or trip aforesaid.*

It was a further condition, indorsed on the policy, that if the said vessel "be or upon regular survey shall be found rotten and deemed unseaworthy, or unfit to prosecute said voyage or trip, on account of being unsound or rotten, then the said company shall not be liable to make good any loss under the policy."

"*And further*, that the said vessel shall at all times, during the continuance of this policy, be sound and seaworthy

and be well manned, and found in anchors, cables, rigging, tackle and apparel, also in *all other things and means necessary and proper for the safe navigation thereof.*"

The declaration averred that the vessel was at all times during the said voyage, and to the happening of the said loss, sound and seaworthy and well manned, and found in anchors, cables, rigging, tackle and apparel, and also in all other things and means necessary and proper for the safe navigation thereof; nor was the said loss or damage in any way occasioned, nor did it happen from any of the causes or exceptions excepted by the conditions indorsed on the said policy or memorandum in writing, or under any circumstances which in or by said condition would exempt the defendants from liability therefor.

Among other pleas, the defendants pleaded (5th plea,) "that the loss and damage in the first count mentioned (which was the only count on the policy), did happen, and was occasioned from want of ordinary care and skill, such as was necessary and proper on the voyage in the said first count mentioned, and in said navigation in lading and navigating the said vessel."

And further (10th plea), "that after the commencement of the voyage, and whilst the vessel was proceeding on the said voyage, and before her arrival at Quebec, the said vessel and cargo were, by the want of ordinary care, skill, knowledge, attention and seamanship on the part of the captain and others in charge of the said steamer, and from the gross carelessness and ignorance of the channel and navigation of the river St. Lawrence on the part of the said captain and others in charge thereof, and not from any of the ordinary perils or misfortunes of the said navigation, run against and stranded upon an island in the said river St. Lawrence, and by means of such stranding and being aground, *so caused as aforesaid*, the said flour in the said first count mentioned so being on board of the said steamer was thereby damaged," &c.

The plaintiffs joined issue on the fifth plea, which concluded to the country, and replied *de injuria* to the 10th—that is, that the defendants, without such cause as is stated in that plea, broke their promise, &c.

It was proved on the trial, that the steamer Princess Victoria took in the flour of the plaintiffs at Port Credit, 1290 barrels, on the 23rd of September, 1848, and, touching at Toronto on her voyage down, they there shipped about 500 barrels more.

After they left Toronto they experienced heavy weather, or rather met a heavy sea, which occasioned the vessel to labor extremely. She had been built for river navigation only, and in the opinion of some of the witnesses was ill adapted for the lake. The crew seemed to think their situation very perilous, and she was taken into Port Darlington, and there lightened of a considerable portion of the deck cargo. She then proceeded on the voyage to Kingston, and met with no difficulty on the way. There was a good deal of evidence to shew that much of the plaintiffs' flour had received damage before the steamer reached Port Darlington, from the seams opening in consequence of her laboring in the heavy sea, and being, as was alleged, much overloaded and a craft very unsuitable for lake navigation, especially in the autumn. It appeared that she was built in 1836, to run as a ferry boat between Montreal and Lapraire, and had lately been fitted up and repaired with a view to employ her as a freight boat between Quebec, Toronto and Hamilton.

It was contended that neither her build nor draft of water were such as to make her a safe boat for the lake, and that she was too old.

On the other hand, in the opinion of some witnesses who were examined, she was seaworthy even for the navigation on which they had placed her, and in which she had already made one trip, though not a satisfactory one.

Whether much, if any, of the plaintiff's flour had received damage before the vessel got to Kingston, was not clear upon the evidence. Nothing was done to ascertain its condition, and though the evidence preponderated much in favor of the supposition that some damage must have been received between Toronto and Port Darlington, yet it was uncertain to what extent the flour might have been injured; and in the opinion of one or more of the witnesses, it had not been injured at all.

There is no legal provision for taking pilots on the river between Kingston and Montreal; and there are no pilots licensed for that navigation.

It was said to be usual, when the master was not intimately acquainted with the river, to take a pilot from Kingston downward, on account of the numerous islands and the intricacy of the channel. The policy, in this case, contained a condition, that a pilot should be taken for the rapids called the Cedars and Cascades; but required no pilot to be taken at any other point on the route.

On the passage up from Montreal, the captain had taken a pilot, but for some reason not explained, discharged him at Kingston, on his return,—telling him that he would pilot the vessel down himself. He did, however, engage a person at Kingston, named Bryant, as pilot, whose qualifications, according to the evidence, seemed very questionable: some witnesses declaring that they had been employed on the river many years as pilots between Kingston and Montreal, and had never seen or heard of him as a pilot. There was evidence also that upon leaving Kingston, the vessel seemed to be so unskilfully managed that some persons who saw her draw out from the wharf predicted she would not go down without an accident. On the river, about nine miles above Brockville, there is an island called Cross-over Island, two miles and more from our shore, and about a mile from the American coast, on the lower point of which there had been a light-house erected, and in use two years or more,—there being a ledge of rocks just below the island, towards the south shore, which makes it necessary to bear north-east immediately after passing the island, and there being abundance of room and depth of water to the north, and no difficulty whatever, especially with a steam-vessel, in keeping clear of the shoal.

The Princess Victoria arrived at that point about eight or nine in the evening; the night was in no respect unfavorable; the weather was moderate, and there was moonlight; Bryant was on deck and observed the light on the island as they passed it. The engineer swore that he was talking to the captain and Bryant, on the deck, just as they

passed the light ; that he went below, and in a few minutes the vessel struck on a flat rock, about four feet under water, called the Whale's Back. She grounded amidships, and could not be got off till they had landed the cargo on the island, which was not till two or three days after. It was then discovered that a hole had been made in her bottom, and she had several feet of water in the hold, covering the second tier of barrels. This witness swore that he thought there was no carelessness ; that the pilot and captain, when he left the deck, were looking out ; that Bryant said as they passed the light on the island, that he thought it was a light on shore ; the witness told him it was a light-house. The Captain declared he knew the river well ; but what he thought of the light was not stated.

Another witness, who with his steamer towed the Princess Victoria off the rock, swore that the navigation was difficult at that point ; that he had himself a steamer aground there ; that there were several shoals there ; that it was the worst part of the river to navigate, and that vessels often grounded there ; that he had known Bryant 20 years, that he had been in a boat belonging to the witness as a pilot, and that he thought him a fit person ; that the witness himself had owned a vessel on the river twenty years, and never took a pilot between Kingston and Prescott, which is below Brockville, and that his captain and crew always took his vessel down. He swore, however, that the light on the island was a plain light, and had been up two or three years.

On the defence, it was proved that the distance from the light-house to the north shore was more than two miles ; that there was no other light-house within twenty miles ; that the proper passage was so well known to those acquainted with the navigation, and so well marked by the islands, and the make of the main shore, and a conspicuous point below, that in such a night as this was, there would be no difficulty even without light in seeing the channel. The second engineer swore that when the vessel struck, he ran on deck, and the general cry was, that it was strange they should run aground on so light a night.

It was admitted on the trial that the vessel was quite out of the proper channel when she grounded; for instead of making the turn towards north-east, as she should have done immediately after passing the light, she continued on her course, which took her among the rocks and shoals, and even inside of most of them; and if she had not struck when she did, she must have been brought up by striking a part of the south shore.

Another witness swore that he was on board, and saw they were going aground, and stopped the engine, but it was too late; that he saw the light five miles off, and told Bryant, but he said it was not the light-house; that another person on board said they were going on a rock a minute or two before they struck; that no one who knew the river well would have gone there; that Bryant told him that he (Bryant) did not know the river well.

Another witness swore that he had been thirteen years a boatman on the river, and did not know Bryant; that it was a fine clear night when they ran aground; that he went to the captain and told him they were going wrong, but was bid to mind his business; that the light was quite plain.

Another witness swore that he had been twenty-seven years a pilot between Kingston and Montreal; that he had never seen Bryant there as a pilot, and he thought he knew every man who could pilot such a boat down; that the captain applied to him at Kingston to go as pilot, but refused to give his price, 5*l.*; that the captain said he cared nothing about a pilot—that it was only to save his insurance, and that he could take down a vessel himself.

This witness swore that the vessel was half a mile off her course, and this in a river where there was nothing but ignorance of the channel that could account for it.

One of the plaintiff's own witnesses swore that it was a fine clear night when she struck, and that it was usual in that navigation to take a pilot.

There was evidence that the captain was generally intoxicated, and that he was quarrelsome, and on bad terms with his crew. Upon the charge of intemperance,

the testimony was contradictory ; but there was clear proof that there was not a good understanding between him and his men. Upon one pretence or another, several of them had abandoned the vessel or had been discharged at different places on the voyage ; and the inability to produce the captain himself, was accounted for by his being in gaol at Ogdensburg, in the United States, upon some process sued out by the owner of the vessel.

The case was tried before the Chief Justice, who directed the jury that as the plaintiffs had charged the loss to have arisen from the vessel being stranded on a certain island in the river St. Lawrence, near Brockville, they could not recover on this declaration for any damage that might in fact have been occasioned, as suggested, by the vessel taking in water during a gale on lake Ontario long before she entered the river, in consequence of being over-loaded, and of her general unseaworthiness ; for that would be a casualty of a totally different kind, and that it was necessary the evidence should substantially support the declaration as regarded the nature of the accident. But that the evidence as to any damage being received by the flour before the stranding, was conflicting and inconclusive ; and if any injury had been done to it before touching at Darlington, it was quite uncertain to what extent, there having been no examination of this flour till after the stranding ; and as there was no doubt that the vessel, in consequence of the stranding, filled, by which all the flour, or any of it that had escaped before was at any rate spoiled, the jury would in such a case do well to assume that all the flour that was damaged was damaged in consequence of the stranding, unless they saw clearly that the fact was otherwise ; because the plaintiffs had not the opportunity of knowing certainly all the particulars of the voyage, and might reasonably ascribe the loss to what must inevitably have produced it in case the flour had not been so damaged before as to be incapable of further injury, which was not certainly shewn in regard to any of it, and was clearly not true in respect to the greater portion.

Taking this view of the case, the Chief Justice directed

the jury that the verdict must turn upon the issues on the fifth and tenth pleas, rather than upon those which related to the seaworthiness and the improper lading of the vessel, since these were clearly not the occasion of the vessel grounding upon the rock in the river, and were only relied upon by the defendants as accounting for any damage that may have been received by the cargo before she reached Port Darlington ; in respect to which damage the plaintiffs could not be allowed to recover in this action.

The jury were told that the plaintiff's right to recover for the loss occasioned by the stranding in the river, must turn upon the truth or untruth of the fifth and tenth pleas ; and they were requested to find for the plaintiffs or defendants on those pleas, according as they were or were not satisfied that the grounding upon the rock was owing to the vessel being at the time grossly mismanaged, either from ignorance of what any person taking a vessel down the river ought to know, or from gross negligence in not observing or attending to it.

It was explained to the jury, that neither the law nor the policy in this particular case made it necessary to take a pilot, and that the mere fact of not having one fully competent, or not having any, would be no objection to the assured recovering ; but that, considering the terms of this policy, it would be an objection and a good defence under the fifth and tenth pleas, if the vessel were without some one on board capable, from his knowledge of the river, of keeping her clear of shoals in a favourable time, which he could not be unless he had the knowledge of this light-house, and the channel into which it was intended to guide ; and that if either the master or the person to whom he trusted as a pilot, had the necessary knowledge of the river, then it would be for them to say whether there was not gross want of care and attention on their part, which would be equally fatal to the plaintiffs' right to recover on these pleas as want of skill.

The jury found for the defendants, on the 5th and 10th pleas, and for the plaintiffs on the other issues.

Cameron, Q. C., and *Crooks* obtained a rule for a new trial, on the law and evidence, and for misdirection.

Hagarty shewed cause.

The following cases were cited :—*Dawson v. Atty*, 7 E. R. 367 ; *Mittleberger v. B. A. F. L. Ass. Com.* 2 U. C. R. 439 ; *Robertson v. French*, 4 E. R. 134 ; *Park on Insurance*, ch. 2, p. 128, ch. 11 ; 2 C. & J. 244 ; *McFaul v. Montreal Inland Ins. Co.* 2 Tyr. S. C. ; 2 U. C. R. 59 ; *Davis v. M. F. Ins. Co.* 3 U. C. R. 18.

ROBINSON, C. J., delivered the judgment of the court.

Besides the fifth and tenth pleas, which were found (and I think properly) for the defendants, there were several pleas which were clearly not sustained on the part of the defendants, and on which, therefore, the plaintiffs received a verdict ; and there were other pleas, which, without averring that the loss occurred otherwise than by stranding, and without imputing the stranding to any defect in the vessel or her management, set up as a defence, “ that she was not, during the voyage, loaded in such manner as is usual or proper for vessels employed in the navigation mentioned in the declaration ; and that she was not at all times during the voyage and the continuance of the policy, to the happening of the said loss, sound and seaworthy, and well manned, and found in all things, and means necessary and proper for the safe navigation thereof, as in the declaration mentioned.”

The fourth and seventh pleas were to that effect, and perhaps the eighth, though that plea, as it is framed, could scarcely be held to be sustained without proving that the stranding occurred from the vessel being over-loaded, and from that cause being too deep in the water.

At the trial, the defendants’ counsel insisted that if upon these defences of the vessel being unseaworthy and improperly laden, either at the commencement of the voyage or at any time before the loss accrued, he was found entitled by the evidence to succeed, the policy would be avoided, though the accident might clearly not be attributed to any such cause ; and he referred to the case of *Mittleberger* against this same insurance company, upon a marine policy, precisely like the present, as affirming that principle, which is founded on the distinction between express covenants in a policy and merely implied conditions.

The same point has been adverted to in this case in arguing the rule for a new trial; and though the defendants are not the parties moving against the verdict, it is proper to give it some consideration, because, if the defendants were clearly entitled to have succeeded on the fourth and seventh pleas, and if the defences set up in them would have avoided the policy equally with those pleaded in the fifth and tenth pleas, that would of course furnish an argument against disturbing the verdict which has been rendered for the defendants on those last-mentioned pleas.

I cannot certainly say what the jury might have found as to the fact of general unseaworthiness in the vessel, or of being overladen when she left Toronto, because the testimony was conflicting. Some of the witnesses examined, and the evidence of other witnesses in Lower Canada, taken upon commission, would, if fully credited, have disproved those defences; but in my opinion, the evidence was altogether stronger to lead to the conclusion that the vessel was not suitable and safe for navigating lake Ontario with such a cargo as she had on board, and particularly in the autumn, but was decidedly otherwise.

She had been built twelve years before, at Quebec, with the intention of employing her only on the river: she had been commonly used as a ferry-boat, in a passage which admitted only of a vessel drawing between three and four feet water.

The improvements made long after in the river St. Lawrence, made the lake accessible to her; and it is to be feared, as one of the consequences of these improvements, that persons eager to find profitable employment for their boats may be tempted to use upon the lakes a description of craft not originally intended for them, and not safe for such navigation. They may do this from being either ignorant of the difficulties to be encountered, or being willing imprudently to make experiments.

I think the evidence shewed this to be a case of that kind, notwithstanding what was sworn to by some of the witnesses; and I should be surprised to learn that after the experience of the two trips made by the "Victoria" on the

lake, she has ever been used in the condition in which she was when she made the trip in question, laden to the same degree.

It was evident that the crew were so terrified that it was difficult to keep them on board; and there is great reason to believe that if she had met with such boisterous weather on the lake as is very common in the autumn, she might not have reached a port in safety. Still it was only with respect to the lake navigation that she could have been pronounced unseaworthy; for the purpose of taking a full cargo of flour from Kingston to Montreal, she was perfectly safe and suitable—at least, for anything that appeared. The having too little hold of the water to make her safe on the lake, made her only the less liable to run on the shoals in the river. Her cargo did not sink her so deep, probably, as the general run of steamers with a less load. There was clearly no want of water if she had taken the right channel; but proceeding on the channel which from ignorance or carelessness was taken, she must have run aground whatever might have been her draft of water; and there is no reason for supposing that any vessel running aground as she did, would not have received the same injury, attended with the same damage to the cargo. Neither her load nor her build was the cause of her being stranded.

Still the defendants could insist, and with much authority apparently in their favour, that whether the unseaworthiness occasioned the loss or not, was not the question, but whether the condition had been strictly fulfilled, on which the claim under the policy must depend; because no doubt it is a principle that express warranties on the part of the assured must be strictly complied with, or the policy will be invalidated. The case of *De Hahn v. Hartley*, 1 T. R. 343, is to that effect, and many others might be cited.

In this respect there is a difference between a covenant or condition, and a mere representation; for in the latter case, if anything has been falsely represented which would increase the risk, the policy will not be avoided by it where no fraud was intended, unless the loss can be shewn to have arisen from the circumstances in regard to which the insurer has been misled.

Taking, however, a view much in favour of the defendants in this case, respecting the weight of evidence on the fifth and tenth pleas, I was not prepared to direct in their favour also as regarded the fourth and seventh pleas, upon the principle contended for. I do not doubt that the case, in this court, of *Mittleberger v. B. A. Insurance Company*, was properly decided; on the contrary, I was satisfied that it was; and if I had seen clearly that it must govern this case upon the fourth and seventh pleas, I should have had no hesitation in following it. But it is plain that that case could not decide the present.

The point then before the court, arose upon demurrer, not upon the effect of evidence; and it was impossible to doubt that the declaration in that case was defective; for the plaintiff, while he set out the same conditions of the policy as to seaworthiness which are now in question, contented himself with averring that the vessel was sound and seaworthy, and well equipped, &c., *at the commencement of the voyage*, though the condition was, as in this policy, that she should be so at all times during the continuance of the policy, and till the loss happened. The evident insufficiency of the declaration in this respect is pointed out in the judgment of the court.

Here the facts are reversed, and the vessel, which perhaps in the opinion of the jury must have been considered unseaworthy and improperly laden with reference to a part of her navigation—namely, in the open lake—where she would be exposed to a heavy sea, and might founder or break up, could not be justly said to be unseaworthy or improperly laden with reference to navigation in the river, where she was from mere ignorance or inattention stranded.

I inclined rather at the trial to the opinion, that the conditions in the policy on which the defence set up in the fourth and seventh pleas were founded, must in reason receive such a construction as will make them applicable to the navigation in which the vessel is at the moment of loss engaged; and where the policy says that “the vessel shall at all times during the continuance of the policy be sound and seaworthy, and be well manned and found in all

things and means necessary and proper for *the safe navigation thereof*," I considered it reasonable to understand the parties to mean that she shall be at all times sufficiently staunch and well-found for the navigation in which she is engaged, and in which she may, notwithstanding, from any casualty, be lost or damaged. I looked upon these words as inserted for the protection of the insurers against the consequence of the principle of law laid down by the Court of Exchequer Chamber, in *Dixon v. Sadler*, 8 M. & W. 895—"that there is no implied warranty on the part of the insured for the continuance of the seaworthiness of the vessel, or for the performance of their duty by the master and crew, *during the whole course of the voyage*."

With such a condition in the policy as we are now considering, it will be always quite clear that where a loss has arisen from the vessel being unseaworthy or ill found, it will not be sufficient for the assured to shew that she was seaworthy and well found when the voyage commenced, if she were wholly otherwise when the accident occurred, and had not been rendered so by the perils and mere ordinary effects of the voyage.

But according to what the plaintiffs' counsel contended for as regarded the fourth and seventh pleas, the want of setting poles, which might in some cases be necessary for keeping a boat off the rocks while she was being towed up the river, might disable the assured from recovering if she afterwards foundered in a storm in the open lake, or from the want of proper anchors on board when she was injured by shipping a sea out of soundings, or was accidentally burnt.

I thought at the trial that upon a view of the whole policy, the conditions of seaworthiness upon an insurance for a voyage like this, must be taken with reference to the navigation in which the loss occurs. It is laid down by Mr. Park, in his *Treatise on Insurance*, "that a policy of insurance being a contract of indemnity and being only considered as a simple contract, must always be construed as nearly as possible according to the intention of the contracting parties, and not according to the strict and literal meaning of the words; and that as the benefit of the

insured and the advancement of trade are the great objects of insurance, policies are to be largely construed in order to attain these ends." This, it is true, is said chiefly with reference to the construction of policies upon any doubt as to what damage or loss they shall be held to cover; but the principle is laid down broadly, and ought to operate equally.—2 B & al. 82; 4 E. R. 135. I refer to a case of *Ross & Bradshaw*, 1 B. & C. Rep. 312, reported more at length by Mr. Park, in his twenty-second chapter, and not questioned as a proper decision; which I confess, as it is a case of express warranty in a case of life assurance, would seem to make it difficult to hold in a case like the present that the assured could in this case be held disabled from recovery for a loss by stranding in the river, by the fact of a defect in the vessel, which could only be prejudicial in the open lake, and under circumstances wholly different from those in which the loss occurred.

Yet I am aware that the general language of the courts is against the insured recovering when there has been a breach of an express warranty, although the breach may have had no influence in producing the loss.

Whenever a case arises upon one of these policies, in which the decision must turn upon that question, it may be necessary to go more fully into it.

I mean to do no more now than to intimate that my present impression is, that upon the present policy, seaworthiness must be considered in connexion with the kind of navigation in which the vessel is employed at the time of the loss, for the parties can only reasonably be held to have meant that.

If the fourth and seventh pleas had stood alone, it might have been necessary to consider whether any objection to them would not rather have been on a motion for judgment *non obstante*, than by way of application against the verdict, if that had been found for the defendant upon such evidence as was given. It would be well, perhaps, that the policy should be so framed as to exclude all doubt, as it easily might be; and it is partly with that view that I have thought it right to discuss the question; for the rule we

have to dispose of must turn upon our opinion whether there was any misdirection or anything wrong in the finding of the jury upon the fifth and tenth pleas, which are alone directly in question upon this rule.

What the jury were sworn to determine was, whether the defences there set up were true : they had to try the issues joined, and give a true verdict upon the evidence. I could not do otherwise than tell them, as I did, to find for the plaintiffs or defendants on those pleas, according as the facts pleaded were or were not proved to their satisfaction. If it could be made a question, whether under this policy the fact of the loss being occasioned by gross carelessness or ignorance in the management of the vessel would deprive the assured of their remedy, that question should have been raised by demurrer to the pleas, or, after verdict, by motion for judgment *non obstante*. At the trial, what was required was to find the truth of the fact pleaded, and nothing more.

We do not think any other verdict than was given would have been consistent with the evidence. A diagram was put in proof, which was not objected to as inaccurate, and which exhibited the blunder or carelessness in so strong a light as to make the conclusion seem irresistible ; and considering how familiar we almost all are with the navigation of the river between Kingston and Brockville, I dare say that the jury, which included several merchants, who must be in the frequent habit of making the passage, had little difficulty in determining that if this condition in the policy, as to not being liable for losses occasioned by carelessness or ignorance, is to have effect given to it in any case, it must have its effect in the present, for there was no stress of weather—no unfavourable circumstance—nothing to produce accident but an ignorance of, or inattention to, what every one undertaking to conduct a vessel down the river should be supposed to know.

Whether the insertion of such an exception in the policy is not a deviation from the common form, and whether to exempt the insurer from liability on such grounds is not inconsistent with the spirit and object of marine insurance, are different questions. It may become material for the

defendants to consider whether they can prudently persist in maintaining a form of policy excluding risks which are generally held to be fairly within the perils of navigation ; and those wishing to insure may find it necessary to consider whether they will content themselves with being covered only to the extent provided by this policy, and whether they can obtain better security elsewhere against what are in general regarded as perils of the navigation. But in the meantime, we cannot hold that the jury did wrong in finding that the accident in this case did in fact arise from gross carelessness or want of skill ; nor can we hold that the parties may not legally, if they please, in their contract, "except all losses arising from want of ordinary care or skill ;" still less can we hold that this policy does not in the plainest terms contain such an exception.

This being so, in the opinion of my brothers as well as in my own judgment, we cannot do otherwise than discharge the rule, and leave the verdict for the defendants to stand ; for we do not consider that the effect of the exception can be held not to apply in the case of the cargo insured, as well as of the vessel.

It was in the power of the insurers to refuse to take any risk on other terms, and the terms which they have entered into extend to the goods as well as to the vessel.

On marine policies, as they are generally framed, it would certainly be no answer to the claim of the person whose cargo had been lost or damaged, that the captain or crew had been careless or unskilful ; but the parties may, if they please, so frame their contract as to make the right to recover depend on that ; and such, we think, is the effect of the policy now before us. And there is nothing contrary to natural justice in this, though we must see that it is an inexpedient contract for the owner of the cargo to enter into.

The insurer might say, on his side, when he is asked to insure, "I will be answerable for your goods if you employ careful and competent people to carry them. You have the means of knowledge and of selection, and in that respect we cannot control you. So far, therefore, you must act at your own peril."

The person wishing to insure might reasonably answer to this, that whether a vessel shall be as well managed as she might be, at the time of any accident occurring, might always be made the subject of a doubtful question, and is therefore usually left to be among the chances insured against, otherwise the owner of a cargo would never know when he was safe.

Still, after all that might be urged on both sides, the parties would be left at liberty to enter into such a contract of insurance as they pleased, and the question at least must be, not what is the general law and course of insurance in this respect, nor what is the construction and effect of other policies; but the question to be determined between these parties is, what are the terms of the contract of insurance into which *they* entered, and what is the meaning and effect of it.

Looking at it thus, as we must do, we can draw no distinction between the owner of cargo suffering loss, and the owner of the vessel, for the language of the policy does not admit of it.

Per Cur.—Rule discharged.

DOE LOWRY V. GRANT.

Will—Misdescription of a lot—Admission of parol evidence—Registration.

Held, per Cur., upon the following will—"Know ye that I, Michael Lowry, do bequeath *all* and every part of my real property situated in the *township of Huntley*, viz.," (then followed a bequest of 2s. 8½d. to John's eldest son, when demanded; also pecuniary bequests of 30*l.* and 12*l.* 10s. to two of his daughters; also bequests of money and chattels to his wife; and *then* followed also the north half of lot No. 26 in the 6th concession of Huntley, and No. 23 in the 6th concession of Huntley, being the front half, and the front half of No. 22 in the 7th concession of Huntley, and also the south-east half of No. 19 in the 6th concession of Huntley; also all his stock, to be divided equally between Edward Lowry and Samuel Lowry")—that parol evidence (notwithstanding that the words of the testator in the will doth "bequeath all and every part of his real property in the township of Huntley" were not used with reference to his sons Edward and Samuel) was admissible, to shew that the testator did not own 26, but 22, in the 6th concession of Huntley, and that (it appearing upon such evidence that lot 26 had been inserted by mistake in the will for) lot 22 lot No. 22 would pass under the will.

It is no objection to lot 22 passing under the will, that the registration of such a will—changed in its most material contents—can afford no information on the face of it, as to what lands were affected by it.

Ejectment for the north half of lot No. 22, in the 6th concession of Huntley.

The plaintiff made title as eldest son and heir of Michael Lowry.

For the defendant, it was endeavoured to be shewn, that the testator had by his will devised away this land. The will was produced, and proved. It ran thus:—"Know ye that I, Michael Lowry, of," &c., "doth bequeath in the following manner all and every part of my real property, situated in the township of Huntley, viz." (then followed a bequest of 2s. 8½d. to John's oldest son, when demanded; also pecuniary bequests of 30*l.* and 12*l.* 10s. to two of his daughters; also bequests of money and chattels to his wife; and then followed, "also the north half of lot No. 26 in the 6th concession of Huntley, and No. 23 in the 6th concession of Huntley, being the front half, and the front half of 22 in the 7th concession of Huntley, also the south-east of 19 in the 6th concession of Huntley; also all his stock, to be divided equally between Edward Lowry and Samuel Lowry, his sons. If Edward and Samuel Lowry should happen to dispose of the land, property and stock, the dowry left to Mrs. Shouldice and Mrs. Lowry to be paid down at the time of sale"—meaning the sums he had bequeathed to his daughter Mrs. Shouldice, and to his wife, as before mentioned. He then appointed his wife and two other persons to execute his will.)

It was proved that the testator made this will on the 25th of December, 1845. The person who drew it was examined on the trial, and swore that he did not know how he came to insert lot No. 26; that although the testator sent for him to draw his will, and gave him instructions, yet he was not sure that he told him to put down the north half of 26, or said anything to him in particular about the lot he *lived* on.

The witness swore that he knew that the north half of 22 in the 6th concession was the land on which the testator was living, and that he did not own any part of lot 26; but how he came to insert 26 instead of 22, he could not state from any recollection he had of the circumstances.

The will, he swore, was read over to the testator, who was in a state of mind to hear and understand it, and to

give directions; that the testator was taken ill on the Wednesday before the Friday on which the will was drawn (25th December), and that he lived to the 7th or 8th of January following; that he (the witness) did not discover the mistake till about a year after the testator's death, though he had read it to the testator, and after the funeral. He remembered that the testator had observed to him that his eldest son had already got his share.

The learned judge referred to the jury to say whether the testator had directed lot 22 to be inserted in the will, and not 26. The jury found that such direction was not proved to them, and they found for the plaintiff—leave being reserved to enter a verdict for the defendant, if the court, upon the will itself (coupled with the evidence of the mistake), should consider that the land had passed.

Eccles obtained a rule upon the leave reserved, to enter a verdict for the defendant, and on affidavit. He cited *In re Chapman*, 8 Jurist, 902; *Miller v. Traviss*, 8 Bing. 251.

Vankoughnet shewed cause. He cited *Doe Small v. Allen*, 8 T. R. 497; *Doe Bates v. Clayton*, 8 E. B. 147; *Bowman v. Milbank*, 1 Lev. 130; *Mohun v. Mohun*, 1 Swanston, 201.

ROBINSON, C. J., delivered the judgment of the court.

There would be no room for doubt in this case if the power of this court were unlimited for giving effect to what they see upon the face of a will was the real intention of the testator; for it is plain that the intention here was to devise all the land which he owned in the township of Huntley to his sons Edward and Samuel. The only question is, whether we are authorized to say so by the rules of construction which the courts have adopted.

If the words "doth bequeath all and every part of his real property in the township of Huntley" had been used with reference to his sons Edward and Samuel, then there would have been no room left for doubt; because then we must have held, that having devised all his lands in Huntley to them, any misdescription which he might afterwards have happened to give of those lands, would not have signified: it would have been a mere erroneous attempt at

amplification of a description which was sufficiently certain before, and the maxim that *falsa demonstratio non nocet*, would have been clearly applicable.

But this will does not run so. The testator merely announces in the beginning of his will, an intention to bequeath all his real property, not an intention to give it to any one in particular, but that general intention to leave nothing undisposed of, which is usually expressed by way of introduction, and which we may suppose actuates every testator when he sits down to make his will.

But if the testator, having used these words, and being seised, as it appears he was, of four distinct parcels of land in Huntley, had only devised one of them, or, to bring it more nearly to this case, had devised three of them to Edward and Samuel, saying nothing of the fourth parcel, how would the case have stood then? I think we must have said, "*quod voluit non dixit*," that he had set out with declaring that he intended to devise all his estates, but had not done so, and that the land which he had omitted to make any disposition of must go to his heir.

Then, the difference is, that in this case he affords us clear proof he did intend to devise distinctly all his lands in Huntley to these two sons—but by mistake he has misnamed one of the parcels. When we are told that he did not own lot 26 in the 6th concession, that creates an ambiguity—a doubt, by reason of this extrinsic evidence, which doubt we may resort to extrinsic evidence for removing; and by that evidence we learn, that, besides the three parcels devised to Edward and Samuel, he did own a fourth parcel, which was in the 6th concession of Huntley, and that so far the description is correct, but that it is not lot 26 but lot 22 in that concession.

If that error can be corrected, then we see plainly enough that the effect will be that his devisees will get all his lands in Huntley, and will get no more than he meant to give them, so that his will will go into effect. The cases of *Miller v. Traviss*, 8 Bing. 244, and *Doe dem. Humphreys v. Roberts*, 5 B. & Ald. 407, go far in supporting us in giving that construction to the will, especially the latter case.

Yet I confess I am not without some doubt; but I am glad that in the opinion of my brothers, the north half of 22 may pass under this devise; for no one can fail to see that to give this effect to the will, is consistent with justice and good sense.

I have considered that by thus changing in effect the contents of a will, and that in a most material point, we defeat in a great measure the intention of the Registry Act; for in tracing down the title in the county registry, no notice will appear of this lot as being affected by the will; and any one, therefore, might suppose himself safe in buying from the heir. But the same objection might be raised in a number of cases, when it would be quite clear the decision we should be bound to give would produce that effect: as for instance, if the testator here had made a will simply devising to his two sons named all the lands which he owned in the township of Huntley, without specifying what they were, there is no doubt that such a devise would pass the title, though the registration of such a will would afford no information on the face of it, as to what lands were affected by it.

The case of *Humphreys v. Roberts*, 5 B. & Al. 407, which I have already cited, seems to me very strongly to support the title under the will; and there is a case reported in 2 Bulstrode, 176, much in point, and to the same effect.

In *Miller v. Travers*, 8 Bing. N. C. 247, which I have already cited, and which was referred to in the argument at the bar, the judgment was against the party claiming under the will; and on the facts of that case, it could surely not have been expected that it would be otherwise. But in that judgment, which was an elaborate one, delivered by the late Chief Justice Tindal, assisted by the Lord Chief Baron of the Exchequer, a principle is laid down which seems to take in this case. "It may be admitted," his Lordship says, "that in all cases in which a difficulty arises in applying the words of a will to a thing which is the subject matter of the devise, or to the person of the devisee, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence may be rebutted or

removed by the production of further evidence upon the same subject, calculated to explain what was the estate or subject matter really intended to be devised, or who was the person really intended to take under the will; and this appears to us to be the extent of the maxim, '*Ambiguitas verborum latens verificatione suppletur.*' "

Here, on the face of the will, there is no ambiguity—it is latent. He had declared that he was about to devise all his lands in Huntley, and he devised four parcels, to one of which it is clear he had no manner of title, and had nothing to do with it. The evidence of this fact gives rise to a difficulty, and admits of evidence *dehors*; the will explains and proves it, by shewing that he had in truth four parcels of land in Huntley, as he had devised four, but that he had misdescribed one of them by calling it 26 instead of 22, though he was right in calling it a lot in the 6th concession.

I cannot say I have not felt difficulty in this case, or that I am wholly free from doubt now; but I think it is a reasonable effect, which my brothers concur in giving to this will.

Per Cur.—Postea to defendant.

QUIN V. THE SCHOOL TRUSTEES.

Misjoinder of counts—Demurrer—Arrest of judgment—Liability of trustees to teacher, under School Act 9 Vic. ch. 20—Necessity of contracting specially with teacher under corporate seal.

Held per Cur., that the 1st special count in this declaration (given below) was in assumpsit, and the 2nd in tort, and that there was therefore a misjoinder of counts.

A demurrer for a misjoinder of counts must go to the whole declaration: where therefore the defendant demurred to the 2nd count of a declaration, and the plaintiff demurred to the pleas to the 1st count—*Seem*, that upon the argument of the demurrers, the plaintiff could not object on exceptions taken to the 1st count of the declaration, that the *whole* declaration was bad for misjoinder of counts.

In an action of assumpsit brought by a teacher, against the school trustees appointed by the act 9 Vic. ch. 20, setting out a special agreement to retain the plaintiff in the employment of a teacher, for one year, from, &c., at a certain salary, &c.; and also on a special action on the case, founded upon a parol agreement brought by the teacher, under the same statute, for wrongfully and without cause turning the plaintiff away, and preventing him thereby from earning his salary, it was *Held per Cur.*, that the declaration in both cases was bad, in not averring the agreement to have been made with the defendants by their corporate seal.

If the school trustees appointed under the act 9 Vic. ch. 20, decline to sign the order upon the superintendent for the payment of the teacher's money, as provided for by the act, they may be proceeded against by mandamus, or perhaps they may be sued in a special action for not making the order, but they cannot be sued in an action for *the money*, as that is not in their hands.

Seem, that the school trustees have no power under the act to make an agreement for providing the teacher with board and lodging.

Declaration : 1st count.—“ William Quin, by, &c., complains of the school trustees of section number four, in the township of Seymour, in the district of Newcastle. For that whereas heretofore, to wit, on the 8th day of January, 1847, the defendants, trustees under and by virtue of a certain statute of this province, passed in the ninth year of our sovereign lady Victoria, the now Queen, intituled, ‘ An act for the better establishment and maintenance of common schools in Upper Canada,’ were desirous of employing and securing to the school the services of a teacher of a common school, for the purpose of carrying on the business of their said office.

“ And whereas the plaintiff then was and from thence hitherto hath been and still is a duly qualified common school teacher, and then held and still holds a due and proper certificate to that effect, according to the form of the statute in that case made and provided.

“ Thereupon, in consideration that the plaintiff, at the special instance and request of the defendants, and for and in consideration of the promises of the defendants hereinafter in this count mentioned, then agreed with the defendants to teach and conduct, for the defendants, for the space of one year, the common school in section number four, in the township of Seymour, in the district of Newcastle, according to the regulations provided for by the said act, passed in the ninth year of our sovereign lady Victoria, the now Queen, intituled, an ‘ Act for the better establishment and maintenance of common schools in Upper Canada,’ they the defendants then employed, as such teacher as aforesaid, and then contracted with, bound themselves to and faithfully promised the plaintiff, among other things, that they would retain the plaintiff in their said employment for one whole year from that time—to wit, from the 8th of January, 1847—and pay and give to him the said plaintiff the sum of 30*l.* and his board—meaning, &c.—and proper and reasonable and suitable meat, drink and lodging for said plaintiff during said year ; and the plaintiff saith, that he, confiding in the said promise of the defendants, hath always during said year kept and in all things faith-

fully observed the said contract and agreement with the defendants; of all which they had due notice.

“And the plaintiff further saith, that although the defendants did pay him a small sum, parcel of said sum of 30*l.*—to wit, 7*l.* 10*s.*—and did find and provide him with such board as aforesaid, for a short space of the said year—to wit, for the space of three months—yet the plaintiff saith that the defendants in fact wholly disregarded their said promise and undertaking so by them made as aforesaid, and did not nor would they pay or give to the plaintiff the residue of the said sum of 30*l.*—to wit, the sum of 22*l.* 10*s.*—or any part thereof, or find or provide, afford or give him board as aforesaid, for the residue of the said space of one year—to wit, the space of nine months—or any part thereof, but wholly neglected and refused, and still do neglect and refuse, so to do, although they were, after their first refusal and before the commencement of this suit—to wit, on the 1st day of February, 1848—and frequently before and since, duly requested by the plaintiff so to do.

“And also that whereas heretofore—to wit, on the 8th of January, 1847—the defendants, trustees as aforesaid for the purpose of performing the duties of their said office, were desirous of employing a teacher for the teaching of a common school in said section No. 4 of, &c. : and whereas the plaintiff then was, and from thence hitherto hath been and still is a qualified common school teacher, and held a proper certificate to that effect, according to the form of the statute in that case made and provided : and whereas the defendants, trustees as aforesaid, had then chosen the plaintiff, then and during all the time aforesaid, being such qualified teacher as aforesaid, to teach and conduct for them said school ; thereupon—to wit, on the said 8th of January, 1847—by a certain agreement then made and mutually entered into between the plaintiff and the defendants, it was agreed, among other things, that the plaintiff should, for the space of one year from the time of the making said agreement, teach the school in section No. 4, in, &c., according to the regulations provided for by a certain statute of this province, passed in the ninth year of the

reign of our sovereign lady Victoria, the now Queen, intituted, 'An Act for the better establishment and maintenance of Common Schools in Upper Canada ;' and that the defendants should pay and give to the plaintiff, for his services as such teacher during said period of one year, the sum of 30*l.*, and find and provide the plaintiff such reasonable and proper meat, drink and lodging: and the said defendants then faithfully bound themselves and their successors, and promised the plaintiff that they would well and faithfully observe the said contract and agreement, and pay to the plaintiff the said sum of 30*l.* in quarterly payments during the said year, and find and provide him with meat, drink and lodging, as aforesaid, during the said term. And the plaintiff saith, that he, confiding in the said promise and undertaking of the defendants, did—to wit, on the said 8th of January—commence to teach and conduct the said school in section No. 4, of, &c.; and from thence unto and until the unjust dismissal and prevention of him from his said duties, and the faithful performance of his said duties, did in all things well and faithfully teach and conduct said school according to the regulations provided for by said act; that he did at all times during all the time aforesaid, teach diligently and faithfully all the branches required to be taught in said school, according to the terms of his said agreement, and according to the provisions of said statute; that he did keep the daily, weekly and quarterly register of said school, and maintained proper order and discipline therein, according to the regulations and forms prepared by the Superintendent of Schools; that he had during all the time aforesaid, in said school, such public examinations of said school as required by law, of which he gave due notice to the parents and guardians of all children attending said school, and to all other parties and every person entitled to such notice by law; that he did at all times during the time aforesaid, when requested, act as secretary to the defendants: and the plaintiff further averred, that the defendants did retain and continue him in their employ as such teacher, and suffer and permit him to teach and conduct said school in said section for a short

time—to wit, for the space of four months of said year—and that he so, during all the time aforesaid, having in all things faithfully taught and conducted said school, as aforesaid, was—to wit, on the 8th of April, 1847—ready and willing to teach and conduct said school for the residue of said year: of all which the defendants then had due notice. Nevertheless, the plaintiff saith, that the defendants, not regarding their said promise and undertaking so made as aforesaid, but contriving and wickedly and maliciously intending to injure the plaintiff, did, while the plaintiff was so faithfully teaching and conducting said school as aforesaid, and while they had such due notice as aforesaid of the plaintiff's readiness and willingness to teach and conduct said school for the residue of said year, and before the end and determination of the said year—to wit, on the day and year last aforesaid—wrongfully, &c., discharge the plaintiff from his said employ, and wholly prevent him from completing his agreement, and from teaching and conducting said school during the residue of said year. By reason thereof the plaintiff lost and was deprived of divers great gains and profits, which he might have gained by teaching and conducting said school."

To the first count there were three pleas pleaded, to two of which the plaintiff demurred; but as judgment was afterwards given wholly upon the demurrer to the second count, and upon the legal exception (taken on the argument) to the first count, without referring in any way to these pleas, it is unnecessary to state them at length in the report.

To the second count, the defendants demurred on the following grounds:

First, That this action was against a corporation aggregate, and it was not stated in the said count that the defendants contracted with the plaintiff under their corporate seal.

Secondly, That the said second count and the averments were wholly unintelligible without reference to the first count, and no reference was therein made to the said first count in terms.

Thirdly, That there was no sufficient promise laid in the said second count.

Fourthly, That the action professed to be in assumpsit, and yet the said second count appeared to be in case.

Fifthly, That the matter contained in the said second count formed the subject for an action on the case, and not for an action of assumpsit against the defendant.

Sixthly, That the statute referred to in the said second count was not truly recited.

Seventhly, That the defendants in the said second count were charged in assumpsit for not paying the plaintiff his wages; and the defendants were not bound by the acts referred to, to pay the full amount of wages to the teacher, but only to pay a certain portion thereof after collection—their duties as to the other portion being to give orders on the District Superintendent for that purpose.

Eighthly, That at any rate, the defendants were only bound to pay monies to the teacher after defraying the expenses of collection, and in such manner as directed by the majority of the trustees; that it was not averred in the said declaration that the expenses of collection were defrayed, or shewn when, where, or in what manner the majority of the trustees directed the money to be applied or paid; and that the plaintiff in said second count refers to a certain statute of "this province," not shewing what province he referred to, and the said statute applies only to Upper Canada.

The defendants also gave notice that they intended to rely on the argument of the demurrer in this cause, upon the following exceptions to the first count of the declaration:

First, That assumpsit was not maintainable against these defendants, on the cause of action stated in said first count, and that the action as to said first count should have been in debt or covenant.

Secondly, That the act of parliament referred to was wrongly recited.

Thirdly, That it was not averred in said first count that the defendants contracted under their common seal.

Fourthly, That for the cause of action stated in said first

count, the action should have been a special action upon the case, and not on the case upon premises; and the consideration stated was not sufficient to support the action.

Fifthly, That it was not averred specifically or with precision that the plaintiff performed his part of the contract, or was ready or willing so to do; and that he was not entitled to the residue of the said wages agreed to be paid, not having performed his work as agreed and shewn in said first count.

Sixthly, There was no mutuality of contract shewn.

Seventhly, The agreement was for more than a year, and not to be performed within a year; and it was not averred that it was in writing.

Eighthly, That the whole declaration was bad for misjoinder of counts—the first count being in assumpsit, and the second in case.

Read for the demurrer.—He referred to the following authorities:—9 Vic. ch. 20, sec. 13; *Mayor of Ludlow v. Charlton*, 6 M. & W. 815; *Arnold v. Mayor of Poole*, 4 M. & G. 860; *The Wardens of the City of London v. Robertson et al.* 5 M. & Gr. 131; *Smith v. Birmingham Gas Co.* 1 A. & E. 326; *Blue v. Gas Co.* 6 U. C. R. 174; *The Queen v. Mayor of Stamford*, 6 Q. B. R. 433.

Hagarty contra.—He cited *Raines v. Credit Harbour Co.* 1 U. C. R. 175; *Simpson v. Carr*, 5 U. C. R. 326.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the plaintiff must fail in this case upon several grounds.

The first count is certainly in assumpsit; the second, I take to be in tort for wrongfully and without cause turning the plaintiff away, and thereby preventing him from earning his salary. There is no promise laid to employ him for a year. The promise laid in the second count is only to pay wages and to provide board, which does not necessarily imply an absolute promise to employ. In this respect, the case in this court of *Raines v. Credit Harbour Company*, 1 U. C. R. 175, is in point; and I refer to the cases cited in that judgment of *Aspden v. Austin*, now reported in 5 Q. B. R. 673, and to *Dunn v. Sayles*, same book, p. 685.

There is also, in our opinion, good ground for saying that there is a misjoinder; and if so, judgment might be arrested for that cause, and it would therefore seem that it ought to be in the power of the court to give effect to the objection, although the demurrer here is not to the whole declaration, but only to one count, with demurrers to the pleas in answer to the other count.

As it is clear, however, that the demurrers do only bring in question the several counts, with the pleadings thereon, severally, and not the whole declaration, and as a demurrer for misjoinder must be to the whole declaration, and as the rule that the court will not arrest judgment for any matter which might have been taken advantage of on demurrer would not seem to apply to this case, we are not satisfied that we should give judgment in favour of the defendant by reason of the misjoinder; and as there are other grounds on which the plaintiff must fail, it is better to avoid any doubtful ground. (a)

The first count is in our opinion bad, being in assumpsit upon an alleged agreement made by a corporation, not a trading corporation, and such an agreement as does not in our opinion fall within any of those excepted cases in which the use of their seal is dispensed with. We have so often had occasion to express our opinion on this point, that I consider it unnecessary to repeat the arguments here which have been stated in other cases. I would go to the full extent of English cases in dispensing with the seal, but we have no authority to go beyond them, and to disclaim being bound by the principle to any extent.

The case of *Raines v. Credit Harbor Company* would be no authority for sustaining this case against the exception I speak of, for that was a trading corporation, which this is not, and the judgment in that case was expressed to be given upon other grounds. (b)

Then, in addition to those objections to the first count, we think the action against the trustees is altogether misconceived. They are sued as if the money for paying

(a) 1 Stra. 426; 6 Taunt. 630; 1 Ch. Pl. 701; 4 E. R. 502.

(b) 4 M. & Gr. 860; 6 M. & W. 815.

teachers were in their hands, and were to be paid over by them to the teacher ; but that is not so.

According to 9 Vic. ch. 20, secs. 8 and 13, it is the district superintendent who is to pay the money, not the trustees, so far at least as regards that part of it which is paid by the government.

As to the portion raised by rate upon the inhabitants, that also, by the enactments of the law, goes into the hands of a treasurer, who is merely subject to their order. He may not have received the money, or may refuse to obey their order, and in neither case can they be liable to an action for not paying the money. They are public officers, who have only to discharge their proper duty. If they refused to make an order, a mandamus would lie against them, or perhaps a special action for not making the order, but not an action for the money, for that is not in their hands. If the treasurer fails in his duty he is liable to indictment, and might be found liable also to a remedy by action.

As to that part of the agreement laid, which relates to the board and lodging, the statute gives no authority to the corporate body to come under any such engagement.

As to the second count, we must, I think, assume that the plaintiff is founding his action only on a parol assumpsit and not on an agreement under the corporate seal, and the same objection to the want of a sealed contract applies to this count as to the other.

The second count is also bad, in our opinion, in averring that the defendants, not regarding their said *promise*, wrongfully and maliciously dismissed the plaintiff before the year was out, when no promise by the defendants to retain the plaintiff for a year in their employment is laid ; and the defendants may, for all we know, have declined, properly and even necessarily, coming under any such engagement, though it might still be true that they had promised to pay the salary mentioned.

I do not see any other of the objections taken in the special demurrer which we could hold to be tenable.

For the reasons given, we think the defendants are enti-

led to judgment on both demurrers, on account of the insufficiency of the declaration. It is not material therefore to consider the pleas.

Per Cur.—Judgment for the defendants on demurrer.

MAIR V. JONES.

Declaring against a party on a note described by one christian name in full and with a capital letter for his second christian name.

Where a payee was described, in declaring upon a note, by the capital letter of his second christian name, "James A. Walker," as he described himself in the note, instead of giving the second name in full, the court held the declaration good, adhering to the decision in this court of Dougall v. Reafish, 6 U. C. R.

In this case the plaintiff sued the defendant as payee of a note endorsed to the plaintiff, and the declaration averred that the note was made payable to one James A. Walker, and that the said James A. Walker endorsed the same to the plaintiff. To this declaration the defendant demurred, upon the ground that the full christian name of the payee was not set out, or any reason given for describing him simply by an initial letter; but the court said, "Following the decision in this court in Dougall v. Reafish, 6 U. C. R., we give judgment for the plaintiff on demurrer."

ACKLAND V. ADAMS.

Averments required in a count, charging the defendant with maliciously causing a ca. sa. to be endorsed for a larger sum than that warranted by the judgment.

In the third count of a declaration in case for a malicious arrest, the plaintiff charged the defendant with maliciously causing the writ to be endorsed for a larger sum than that warranted by the judgment, but he did not aver a want of probable cause for endorsing the writ for the amount mentioned—nor did he lay any precise day on which the arrest was made—nor did he aver that the defendant maliciously caused the plaintiff to be arrested, *Held per Cur.*, declaration bad upon all these grounds.

Declaration: case for malicious arrest. The third count of the declaration was for maliciously causing the writ to be endorsed for a larger sum than was claimable upon the judgment, by which the plaintiff was imprisoned for a longer time than he otherwise would have been.

There was no averment in this count of the want of probable cause for indorsing the writ for the amount mentioned. There was also no precise day laid on which the arrest was made; and there was no averment that the defendant maliciously caused the plaintiff to be arrested.

Upon these grounds, the defendant demurred to the third count.

Eccles for the demurrer. He cited—*Bank of U. C. v. Lewis*, 3 U. C. R. 325; *Saxon v. Castle*, 6 A. & E. 657.

Hector contra. He cited—*Gough v. Cribb*, 11 M. & W. 497; 1 Saund. 230; *Wentworth v. Bullen*, 9 B. & C. 840; *Petrie v. Lamont*, 3 M. & Gr. 702; 2 Saund. 291; 2 Chit. Pl. 446.

ROBINSON, C. J., delivered the judgment of the court.

We think the exception is a good one which the defendant takes to the third count, that it does not aver a want of probable cause for indorsing the writ for the amount mentioned.

The count is also bad, we think, for not laying any precise day on which the arrest was made, which is the most material fact and the very gist of the action; and in not averring that the defendant maliciously caused the plaintiff to be arrested. (a)

THE BANK OF UPPER CANADA V. GWYNNE.

Mode of declaring against a party who, besides one christian name in full and his surname, has a capital letter before or after his christian name.

Wherever in pleading one christian name shall be given to a party in full, with a capital letter before or after it, besides the surname—the court will not assume that the party so described has any thing more of a second name than is given to him, and that without distinction between vowels and consonants.

The objections taken on the special demurrer to the declaration in this case were that the defendant, who was sued as maker of a promissory note, was sued by the name of John W. Gwynne, not stating the second christian name at length; and also that the name of the payee of the note was stated in the same manner, with one christian name at length, and the letter N. only between that and the surname.

ROBINSON, C. J., delivered the judgment of the court.

Without drawing any distinction as to the force of the objection in the one case and in the other, from the position in which the parties stand in relation to the action, it is sufficient to refer to the case of *Dougall v. Reafish*, decided in this court in Trinity Term last, 6 U. C. R. 391, in which we

determined, for the purpose of putting an end to objections of this kind, and in order to afford a rule that might safely be followed, that in any case in which one christian name shall be given in full, with a capital letter before or after it, besides the surname, the court will not assume that the party so described had any thing more of a second name than is given to him, and this without such distinction between vowels and consonants as seem to have been taken in the late case in the Exchequer in England, of Kindersley v. Nott, 13 Jurist, 658.

Following the decision in Dougall v. Reafish, we give judgment for the plaintiff on demurrer.

Per Cur.—Judgment for the plaintiff on demurrer.

BLANCHFIELD V. BIRDSALL.

Special defence to an action on a promissory note—Held bad on demurrer.

To an action on a note, the defendant pleaded that he made the note on account of payment of a piece of land which the plaintiff then agreed to sell and convey to him, and to which the plaintiff then “professed to have a title,” whereas the plaintiff had not then or at any time afterwards any right in or to the said land, and could not and did not convey the same to the defendant pursuant to the agreement; and so that there never was any consideration for making the said note, except as aforesaid. *Held, per Cur.*—upon demurrer to plea—plea bad.

The plaintiff sued on a promissory note, made payable to him by the defendant on the 5th of January, 1844.

The defendant pleaded, as his defence, that he made the note on account of payment for a piece of land which the plaintiff then agreed to sell and convey to him, and to which the plaintiff “then professed to have a title,” whereas the plaintiff had not then or at any time afterwards any right in or to the said land, and could not and did not convey to the defendant, pursuant to the agreement; and so that there never was any consideration for making the said note, except as aforesaid.

The plaintiff demurred to this plea, because the plea did not shew when a title was to be made, nor what the agreement was, and because the plea was double in relying upon a failure to convey, and an inability to convey.

Leith for the demurrer.—He cited Poole v. Hill, 6 M. & W. 835; De Medina v. Norman, 9 M. & W. 820; Hibble-

white v. McMorine, 5 M. & W. 462; Mortimer v. McCallan, 7 M. & W. 20; McArthur v. Winslow, 6 U. C. R. 144; Wilks v. Smith, 10 M. & W. 355; Matlock v. Kinglake, 10 A. & E. 50; Jones v. Jones, 6 M. & W. 84; Neeley v. Lock, 8 C. & P. 532.

Eccles contra.—He cited Lewis v. Cosgrave, 2 Taunt. 2; Solomon v. Turner, 1 Stark. 51; Allen v. Bennet, 3 Taunt. 175; Spiller v. Westlake, 2 B. & Ad. 155; Wells v. Hopkins, 5 M. & W. 7.

ROBINSON, C. J., delivered the judgment of the court.

There is no doubt the plea is insufficient, for it does not shew when a title was to be made, and so it does not certainly appear that the plaintiff was in default. Nor do we see what the agreement was. For all that is stated in the plea, the promises of the respective parties may have been independent of each other, and the note may be payable at a time long before the plaintiff was bound to convey the land.

If that be so, we must suppose that the defendant relied upon the plaintiff's agreement; and it would be time enough to complain if, when the day for making a title should arrive, the plaintiff should then not have it in his power to fulfil his agreement.

The defendant says that the plaintiff could not and did not convey the land, pursuant to his agreement, without telling us what the agreement was; and he relies upon a double defence—failure to convey and inability to convey; and for all that appears, the defendant may have had possession of the land given to him, and may still hold it, in which case there would not be a total failure of consideration.

The plea cannot be treated as a special plea of fraud and covin, for it wants almost all the ingredients of such a plea.

Per Cur.—Judgment for the plaintiff on demurrer.

MOFFATT V. VANCE.

Mode of declaring on a note made payable to and endorsed by a firm.

In declaring upon a note made payable to and endorsed by a firm—it is necessary to aver that the maker of the note promised to pay “to certain persons using the name and style of,” &c.; and then to aver that the said persons, so using the name and style, &c., did by such name and style, &c., endorse the said note.

Declaration.—The endorsee against the maker of a note, with an averment “that the maker promised to pay Messrs. Gillespie, Moffatt & Co.,” &c., and “the said Messrs. Gillespie, Moffatt & Co. endorsed the note to the plaintiff.”

Demurrer.—Because it was not averred that the said Gillespie, Moffatt & Co. mentioned in the declaration, composed a firm, or that the said note was endorsed by them to the plaintiff by the name, style or firm of Messrs. Gillespie, Moffatt & Co.

Fitzgerald for the demurrer.—He cited *City Bank of Montreal v. Eccles*, 5 U. C. R. 509; *Bull v. Gordon*, 9 M. & W. 344; *Applemans v. Blanche*, 14 M. & W. 154.

Low contra.—He cited *Walker & Co. v. Parkins*, 9 Jur. 665; *Scott v. Soans*, 3 E. R. 111; *Smith v. Ball*, 10 Jur. 946.

ROBINSON, C. J., delivered the judgment of the court.

The point raised by this demurrer has been already before this court (*a*); and we have held that when notes are made payable to and are endorsed by a firm, it is necessary to say that the maker of the note proposed to pay to *certain persons* using the name and style of, &c., and then to aver that the said persons so using the name and style, &c., did by such name and style endorse the said note.

We do not accede to the argument, that Messrs. Gillespie, Moffatt & Co. may, for all we know, be one man's name; for we may venture to say that we know judicially that that is the ordinary way of designating a trading firm, and that it implies, without some explanation, more than one person.

Per Cur.—Judgment for the defendant on demurrer.

AIKIN V. HOWCUTT.

Common count for money paid—Averment of money being paid at defendant's request.

In declaring on the common count for money paid, it must be averred that the money was paid by the plaintiff to the defendant *at his request*.

Declaration.—Common count, for money paid, without stating that the money was paid by the plaintiff to the defendant *at his request*; and for this omission the defendant demurred.

Æ. Irving for the demurrer. **Lount contra.**

The cases cited were—*Victors v. Davies*, 12 M. & W. 758; *Hunt v. Bate*, *Dyer*, 272; *King v. Sears*, 2 C. M. & R. 53; *Wallis v. Scott*, 1 Stra. 89; *Pitt v. New*, 8 B. & C. 654.

ROBINSON, C. J., delivered the judgment of the court.

We have no doubt that it is necessary in a declaration for money paid, for the defendant to aver that it was paid at his request; for without that, the payment would give no right of action. "Goods sold and delivered to *a person*," or "money lent to *a person*," imply in the very words a request or assent of the person buying or borrowing; for there can be no sale without a buyer, nor a loan without a borrower. But one may pay money for or on account of another officiously and without his sanction or privity, which would not make the other his debtor: and in order to shew a good right of action therefore, there must be the statement that the payment was made at the request of the defendant (*a*).

The case of *Pitt v. New* (*b*) is in point; and though there have been some decisions in the Court of Common Pleas to the contrary, we think the view taken in that case is more consistent with reason.

Per Cur.—Judgment for the defendant, on demurrer.

MACLEM V. DITTRICK ET AL.

New trial refused.

A verdict having been given for the defendant on an issue raised as to the genuineness of his endorsement on a note—the court upon a consideration of the evidence and the affidavits stated below, refused, in the exercise of their discretion, to grant a new trial.

Assumpsit on a promissory note for 81*l.* 3*s.* 1*d.*, made by one Elijah Wilkins to Jacob Dittrick, or order, and indorsed by Jacob Dittrick and Gold, the defendants.

Pleas denying indorsement, presentment and notice.

The evidence being weak to establish Dittrick's endorsement, the plaintiff desired to be nonsuited as regarded him, but relied on the proof being sufficient to shew the indorsement by Gold to be genuine. The evidence being left to the jury, they found for the defendant Gold on that issue.

(*a*) 12 M. & W. 760; 3 Mg. & R. 129; 5 M. & Sel. 446. (*b*) 8 B. & C. 654.

ROBINSON, C. J., delivered the judgment of the court.

As regards the evidence, the witnesses spoke doubtfully—even those who were called by the plaintiff to prove the defendant Gould's signature; and though the evidence seems to weigh most in favour of the plaintiff upon that point, it leaves the case doubtful. There was a good deal of evidence to shake the confidence of the jury in the genuineness of the signature, and there was the remarkable fact that the other defendant, Jacob Dittrick, having also denied his endorsement, and the defendant finding the evidence strong to disprove it, desired to be nonsuited as to him, the case being one under our statute 5 Will. IV. chap. 1.

It cannot be wondered at if the jury, after the tacit admission that one of the indorsements was forged, took a more unfavourable view than they might otherwise have done of the rest of the case. I think if the application for a new trial rested on the evidence alone, we could not properly set aside the verdict, for we have no better means of judging than the jury had, and on such a point as this we should not interpose after a verdict, unless we were strongly impressed with a conviction that the jury have done wrong, and can find grounds for that conviction in the evidence. We cannot say that of the present case.

Then, as to the affidavits, they state that since the trial the plaintiff has learned what he did not know before, that the defendant Gould, a few days before the trial, admitted that his indorsement was genuine.

But the affidavits filed on the other side destroy this ground. The defendant utterly denies that he ever used any expressions of the kind in the conversations referred to; and considering that he was, at the time of the alleged conversation, actually on his way to the court, to defend himself against the action upon a plea denying his indorsement, it seems extremely improbable that he would have rendered his defence hopeless by an unnecessary admission in the presence of a number of witnesses. And several persons who were with him at the time swear that they heard no such admission.

The amount at stake is fortunately not very large, or we

should have felt more inclined to allow the plaintiff another opportunity of laying his case before a jury ; for this is a defence which should be dealt with very cautiously, when urged by an indorser of a note after the maker has absconded.

On a careful consideration of the evidence, however, we cannot satisfy ourselves that we should do right in setting aside the verdict. The principles which should guide the discretion of the court in granting new trials in cases of this are clearly laid down in a judgment of C. J. Tindall, in kind *Belcher v. Prittie* (10 Bing. 414) ; and it appears to us that we should depart from those principles, if we should grant a new trial in the present case.

Per Cur.—Rule discharged.

L'ESPERANCE V. DUCHENE.

Seduction, when an action for, will lie.

An action for seduction will lie *before* the birth of the child.

(*DRAPER, J., dissentiente.*)

Declaration. For that the defendant heretofore—viz., on the 1st of June, 1848—with force and arms, assaulted, debauched and carnally knew one Susanna L'Esperance, then and from thence hitherto being the daughter and servant of the plaintiff, whereby she then became pregnant, and so remained and continued for a long space of time—to wit, hitherto—by means of which several premises, the said Susanna L'Esperance for a long time—to wit, from the day and year first aforesaid, hitherto—became and was unable to do or perform the necessary affairs and business of the said plaintiff so being her father as aforesaid ; and thereby the plaintiff during all that time lost and was deprived of the service of his said daughter and servant, and was forced and obliged to pay, and did necessarily pay, lay out and expend, a large sum of money—viz., 100*l.*—in and about the nursing and taking care of the said Susan L'Esperance, his said daughter and servant, during the time aforesaid, to the plaintiff's damage of 200*l.* &c.

Plea—"Not guilty."

The defendant moved, at the trial, for a nonsuit, on the ground that no action could lie before the birth of the child. Leave was reserved to move for a nonsuit in term.

The action was commenced in February 1849; the child was born in March following.

At the time of the seduction, the young woman was living in the family of one Lavalley, where she had been brought up from a child.

Verdict for the plaintiff.

Cameron, Q. C., obtained a rule for a nonsuit, upon the leave reserved. He cited 10 Q. B. R. 725.

Burns shewed cause. He cited 7 M. & Gr. 1033; 8 Jurist, 1101; 1 Ex. Rep. 61; 5 U. C. R. 33.

ROBINSON, C. J.—It was denied on the trial, and the point has been strenuously argued on this rule, that any action can lie for seduction before the birth of the child. Few things, perhaps, could be less desirable, than that parties should be encouraged to suppose that an action for seduction could be maintained upon the mere proof of criminal intercourse, not followed by the birth of a child, nor even by pregnancy. That is not necessary to be maintained, in order to support this verdict; for there is in the declaration the usual averment, that the plaintiff's daughter became pregnant, and was in consequence unable to perform the necessary affairs and business of the plaintiff, her father and master.

In the case of *Joseph v. Cavender*, tried at Winchester in 1834, before Lord Chief Justice Denman, the action was held to lie, although the daughter had not been actually confined before action brought, and although the plaintiff had voluntarily turned her out of his house upon discovery of her pregnancy.

It would seem a most unreasonable and unwise principle which should prevent the action lying before the birth of the child, which is no part of the seduction, but a consequence only, and, it may be, not the most afflicting consequence that might follow. It might happen that the child might never be born; the mother might die of disease, induced by pregnancy, and before delivery, and then all the injury to feelings would be suffered, embittered by the death of the daughter, and probably a much greater expense occasioned by her illness to the father than would generally attend the birth of a child; while in such a case the same loss of labour might also have occurred in reality,

which is in contemplation of law the foundation of the action.

I infer from these considerations, that the injury must, with a view to a remedy for actual loss of service, be complete when pregnancy follows, and interruption of service is occasioned by it, which may well be the case before the child is born; and consequently I take it, that by the law of England, it cannot be an indispensable condition to the maintenance of the action, that there must be a child born. I should bring myself very reluctantly to any other conclusion; because in England in effect, and in this country I may say in terms, since our statute 7 William IV. chapter 8, the grievance which the law regards and desires to afford redress for, is the injury to feelings, the mortification, the domestic unhappiness, the blighted hopes, which follow the seduction; and this must all be suffered before the birth, when the pregnancy is known. And it is not an unimportant consideration in this country, whose position affords such facility for withdrawing from the jurisdiction of our courts, that if the birth of a child must be waited for before any step in an action can be taken, the author of the injury would be in many cases beyond the reach of the party, before he could take measures for preventing it.

Our statute does not, in my view of it, vary the terms of this question. It authorizes no new form of action, but deals with the action of seduction as already well known to the law. A declaration which would not be held in England to contain a sufficient statement of a cause of action for seduction, must be held to be insufficient here. I think this declaration does state what in England would be held to be a good cause of action, and on that ground I consider it to be a good cause of action here.

The only difference created by our statute is, that it dispenses with evidence to prove what the legislature says shall be presumed—namely, the performance of acts of service by the daughter for the father; and it provides further, that whether the daughter be living at home or abroad at the time of being seduced, her parent may equally sustain an action for the wrong: in other words,

the statute enables us to look upon the relation of master and servant as existing in all such cases, for the purpose of this action; and it leaves the question of fact as to what would be an interruption of such service, to rest on the same ground as it does in England, and as it did here before the statute was passed. In England, in the majority of such cases, there is no actual service lost, any more than there need be here. The service is generally ideal, and the law accepts anything as proof of it. Here, we assume it to exist, and this without proof. On that point, the plaintiff is placed by our act so far in the same position as he would be in England when he had given his proof of service. From that point in the case, there is no difference; we have no authority to call that seduction, which is not such by the law of England—or to hold an injury capable of producing a loss of service, which would not be looked upon in the same light there.

I think the jury might well consider that service would in some degree be interrupted by pregnancy, because it would be unusual if it were not; and the foundation for a verdict being thus laid, they had a discretion to give damages for what the law regards as the real injury.

DRAPER, J.—The declaration states that defendant, with force and arms, assaulted, debauched and carnally knew Susanna L'Esperance, *then from thence and hitherto* being the daughter and servant of the plaintiff, whereby she became pregnant and sick with child, and so remained and continued hitherto; by means of which premises she became unable to perform the necessary affairs of the plaintiff so being her father; and thereby the plaintiff during all that time lost the service of his said daughter and servant, and was also put to great expense nursing and taking care of his said daughter and servant. Plea—"Not guilty."

At the trial it was proved that the daughter of plaintiff, then about twenty-two or twenty-three years old, had been brought up since she was fifteen months old, in the house and family of one Benjamin Lavalley, and was still resident there; that the defendant had seduced her; and that the

child was not born until after the action was brought. The jury found for plaintiff—78*l*.

This declaration is, with the exception of the statement of the daughter's delivery, framed according to the English precedents in trespass; in which the plaintiff's right of action depends, first, on the relation of master and servant; secondly, on the loss of service owing to the defendant's wrongful act.

No action is maintainable in England by a parent for a wrong done to a child, except on these two grounds; and if the action be trespass, it makes no difference in the legal principle, whether the trespass be for assault and battery, or for assault and criminal intercourse—the *per quod servitium amisit* is the gist of the action; and case for seduction rests in England on precisely the same relation of master and servant, and the consequential injury by loss of service.—*Woodward v. Walton*, 2 N. R. 276; *Edmondson v. Machell*, 2 T. R. 4; *Irvin v. Dearman*, 11 Ea. 23; *Dean v. Peel*, 5 Ea. 45; *Gray v. Jefferies*, Cro. E. 57; *Postlethwaite v. Parker*, 3 Burr. 1878; *Fores v. Wilson*, Peake, N. P. C. 55; *Mann v. Barrelet*, 6 Esp. 32; *Rex v. Inhabitants of Chillesford*, 4 B. & C. 94; *Carr v. Clarke*, 2 Chit. Rep. 260; *Torrence v. Gibbon*, 5 Q. B. 297; *Hooper v. Luffkin*, 7 B. & C. 387; *Holloway v. Abell*, 7 C. & P. 528; *Andrews v. Askey*, 8 C. & P. 7; *Howard v. Crowther*, 5 Jur. 914; *Bennett v. Allcock*, 2 T. R. 166; and in *Robert Mang's* case, 9 Rep. 113, a; *Ditcham v. Bond*, 2 M. & S. 135; *Hall v. Hollander*, 4 B. & C. 660; *Rippon v. Nuton*, Cro. El. 449; *Grennell v. Wells*, 8 Jur. 1108; *Jones v. Brown*, Peake, N. P. C. 233; *Sallerthwaite v. Dewhurst*, 4 Doug. 315; *Spright v. Oliveira*, 2 Stark Ca. 493; *Tulledge v. Wase*, 3 Wils. 18; *Southernwood v. Ramsden*, Selw. N. P. 1106; 1 Exch. Rep. 61; *Blaymire v. Hayley*, 6 M. & W. 55; *Anonymous*, 1 Smith, 333; *Joseph v. Cavander*, Roscoe Ev. 883; *Starkie*, 989.

The provincial statute 7 William IV. chapter 8, makes a difference in the law—first, by providing that the father, or in case of his death the mother, of any unmarried female who may be seduced after the passing of this act, “and for

whose seduction such father or mother could sustain an action in case such unmarried female were *at the time* dwelling under his or her protection, shall be entitled to maintain an action for seduction notwithstanding such unmarried female was *at the time of her seduction* serving or residing with any other person upon hire or otherwise."

This is not altogether the introduction of a new principle, though it greatly extends the principle of former cases; for according to the judgment in *Dean v. Peel* (a), if the daughter leave her father's house *animo revertendi*, and the seduction be effected during such absence, the action will lie; and the case of *Mann v. Barrelet* (b) is to the same effect; and *Spright v. Oliveira* (c) carries the doctrine still farther. The effect of this clause I take to be, that the non-residence of the daughter with the parent at the time of the seduction, is not under any circumstances a bar to the action, whether it be framed in case or trespass. It does not appear to me to make any other change in the law. The effect of the enactment is the same, as I view it, as if, since the new rules, the defendant pleaded not guilty only, which would admit the female seduced to be the servant of the plaintiff, as alleged in the declaration; for, as Lord Denman observes (d), "the seduction injures the plaintiff, because he is the master of the person seduced," and "not guilty" only operates as a denial of the wrongful act.

The second section, providing that on the trial of any action for seduction brought by the father or mother, it shall not be necessary to give proof of any act or acts of service performed by the person seduced, but the same shall be in all cases presumed, and no proof shall be received to the contrary, removes another difficulty from recovering in such an action, by rendering it unnecessary to prove acts of service in order to establish the relation of master and servant as identical for the purpose of such action with that of parent and child: the effect of this section being, in my opinion, to put the right of maintaining the action by a parent without proving acts of service, on the same footing

(a) 5 Ea. 45. (b) 6 Esp. 32. (c) Stark, 493. (d) 5 Q. B. 300.

as that of a master, who has proved the party seduced to be actually his servant.

I do not think either of these enactments were intended to have the effect of superseding the necessity of proving the *loss* of service, as a consequence of the wrongful act of the defendant; for such loss of service has been always in England, and up to this time I suppose in this country also, treated as the very gist of the action—one of the things which must be alleged and proved, to entitle the master to recover for the assault on, or the seduction of his servant.

In *Kimball v. Smith* (a) it is said of this act, that “it dispenses with the necessity of giving actual evidence of service rendered by the daughter to the father, and places the plaintiff in that respect *in the same situation* as he would be either here or in England after the relation of master and servant had been established by evidence.” And in another part of the same case, equally applicable to this:—“There is no complaint on the record, of a trespass to the freehold of the plaintiff; *all rests on the loss of service and consequential damages as the gist of the action.*”

To this judgment, though I was not in the full court when it was delivered, I entirely subscribe; and it expresses more tersely than I have done, the construction I give to the first two clauses of the act under consideration. To refuse a defendant permission to give evidence to disprove acts of service, and thereby to disprove the relation of master and servant, is one thing; but to refuse to permit him to disprove loss of service, to me appears a totally different matter, and one to which this act was never meant to extend. Equally different is it, to presume acts of service to the parent, for the purpose of clothing him with the right of action as master, and to presume loss of service or consequential damage. These two clauses do not, in my opinion, put the *right of action* on any new or different footing, or enable a plaintiff to maintain it in any new or different character, from what was by law established before—viz., on the footing of service by the seduced, or the character of master by the plaintiff. And therefore it is not, in my

(a) 5 U. C. Rep. 33.

humble judgment, rendered less necessary by these clauses for the plaintiff to prove a wrongful act by the defendant, from which the plaintiff has sustained loss of service, and not merely a wrongful act by the defendant, which would occasion a loss of service, without also shewing the plaintiff to be the person by whom that loss of service is sustained.

In *Eager v. Grimwood (a)*, the court held that an action of trespass for assault and seduction, *per quod*, &c., could not be maintained without proof of loss of service thereby, though only "not guilty" was pleaded. The plaintiff's counsel argued that the declaration would be good if it merely stated that the defendant assaulted and debauched plaintiff's servant, for in such case the law would imply a nominal damage—that the damage alleged was either special or consequential, and if the former it was admitted under the plea of "not guilty." But Alderson B. said that according to that argument, if it appeared that the party seduced was in the service of a third person, the plaintiff would be entitled to a verdict. Now the same answer applies here; for though the first section enables the parent to bring an action where the daughter is resident with a third person, this is limited to her residence at the *time of the seduction*; and the dispensing with proof of acts of service in all cases, operates, as I construe it, only by incontrovertibly establishing the technical relation of master and servant in favour of the parent: after establishing which, the plaintiff has still to prove—first, the wrongful act; secondly, the consequential injury. And *Kimball v. Smith* accords; for there it was held that, not only must be proved that the defendant "debauched and carnally knew" the plaintiff's daughter, but that her pregnancy was the consequence; and the opinion referred to, of Lord Denman, in *Joseph v. Cavander*, strengthens, in my opinion, the necessity of proof of loss of service being sustained by the plaintiff as an absolute fact; for if the effect of the statute, first, to establish acts of service by presumption in all cases, and secondly, when the defendant's wrongful act is proved to infer in like manner the loss of such presumed acts of

(a) 1 Excheq. Rep. 61.

service, it will be difficult to maintain that pregnancy must follow the seduction in order to uphold the action.

The great difficulty I have felt in this case has arisen from the third section, which enacts that, notwithstanding anything in the act, "any person, other than the father or the mother, who by reason of the relation of master or otherwise would have been entitled, if this act had not been passed, to maintain an action for the seduction of an unmarried female, shall be entitled to maintain the action, notwithstanding this act, if the father or mother, who might sue according to this act, shall not be resident in this province at the time of the birth of the child, which shall take place in consequence of such seduction, or, being resident in this province, shall not bring any action for the seduction within six months from the birth of such child."

The only person, besides the father and mother, who could bring such an action, must be one between whom and the female seduced the relation of master and servant can be established by legal evidence to have existed at the time of the seduction, and at the time of the loss of service consequent on such seduction. This section assumes that the right of action of such master is affected by the two previous sections, enabling the parent to sue. Whether in all events the statute would have this effect, is not now the question. In the case of a master, entitled for a valuable consideration to the services of, and bound also to provide for, an unmarried female, who during the currency of such service was seduced, and actually confined in the master's house and at his expense, it does not at first sight appear very reasonable that he should only be entitled to recover in the event of the father or mother, resident in the province, not bringing their action within six months after the birth of the child. And yet either this consequence must follow such a construction, or the defendant must be liable to two actions; one by the parent, for injury to wounded feelings, for the dishonour caused by defendant (which action will be sustained by the presumption of service); the other for injury caused by the actual loss of service, which would be satisfactorily proved.

The whole object of this third section seems to me to be to procure the right of action to the master, under circumstances in which it was deemed possible the former sections might be construed to have interfered with it, but not to give any new right to the parent, not conferred before ; and in the only two events in which it especially refers to, it assumes the birth of a child in consequence of the seduction as an event which must have taken place before the parent (who but for the statute could have maintained no action) is entitled under the statute to sue ; for in the one case the words are, “ if the father or mother, who might sue according to this act ” (i. e. who might sue though the daughter, *at the time of her seduction*, was resident with a third party), “ shall not be resident in this province at the time of the birth of the child ; ” and in the other case, the words are, “ if the father or mother, being resident within the province, shall not bring any action for the seduction within six months from the birth of the child.”

These words, most probably in all cases, where the parent is resident in this province, restrain the master from bringing his action during those six months ; and further, the language used may fully import that the legislature thought the right of action was given to the parent in all cases, no matter where the daughter resided, either at the time of her seduction or delivery, and this construction may be considered strengthened by the proviso in the second section, that in case the father or mother of the female seduced shall, *before the seduction*, have abandoned her and refused to provide for her as an inmate, then her master may bring an action. In other words, these provisions are open to the construction, and such I understand to be the opinion of my learned brothers, that seduction followed by pregnancy entitles the parent under all circumstances, saving the special exceptions, and to the exclusion of any other party, to maintain this action.

Notwithstanding the difficulty created by the words of the third section, and the weight of their united judgments, I cannot bring myself to adopt that view. I am inclined to treat the third section as not intended to enlarge the privi-

leges conferred by the first and second upon parents, but, at all events, as clearly shewing that a parent, enabled only by the act to maintain an action for seduction, cannot do so until she has given birth to a child; that when the daughter when seduced lived away from her parent, and continued absent from his family, so that the seduction caused no consequential damages by way of loss of service and of expense to the parent, the birth of a child must precede the bringing of an action.

I cannot as yet bring myself to determine that the statute so far alters the principles on which, by the law of England, this action rests, that a suit shall be maintainable by a parent for the incontinence of his daughter, when followed by pregnancy, where no consequential *actual* damages has been caused to the parent, especially where, as in the present case, the daughter is of full age, and has not resided in her father's family since she was an infant of fifteen months old.

MACAULAY, J., and McLEAN, J., concurred in opinion with the Chief Justice.

Per Cur.—Rule discharged.

DRAPER, J., *dissentiente*.

DOE DEM. DUNCAN McINTYRE V. BETSEY McINTYRE AND ARCHIBALD McARTHUR.

Construction of will—Fee simple—Estates tail—Illegal restrictions.

A. being seised of certain lands, devised them to his son John, "to hold to him and his heirs for ever;" and then added—"my will is, that none of my sons shall have power to alienate the lands thus bequeathed to them respectively, but they shall transmit them from father to son, or the next nearest heir, so that they may always be preserved in the family." *Held per Cnr.*, that under this devise, John took an estate tail by implication—and that the restriction in the will being only such as distinguished estates in tail, was not an illegal restriction.

Duncan McIntyre being seised of the premises in question, made his will the 5th of June, 1840, devising them to his son John, "to hold to him and his heirs forever;" and adds—"my will is, that none of my sons shall have power to sell or alienate the lands thus bequeathed to them respectively, but they shall transmit them from father to son or the next nearest heir, so that they may always be preserved in the family."

John died without issue ; and the lessor of the plaintiff is his heir-at-law.

On 26th December, 1847, John McIntyre made a will, and devised these premises to Elizabeth, his wife, for life ; remainder to McArthur, the other defendant, in fee, on condition of his taking care of the widow.

The defendant contended that the restriction in the will of Duncan McIntyre was void, for that the land being devised to John in fee he could take no less estate ; that the condition was void as tending to create a perpetuity, and being in restraint of alienation.

By consent, a verdict was given for the plaintiff, with leave to the defendants to move to enter a verdict for them, if the court should think the second devise void by reason of the restriction in the first.

Brough obtained a rule to enter a verdict for the defendants : he cited 2 Mer. 363 ; 2 Bligh 1 ; 5 E. R. 515.

Mr. Richards shewed cause : he cited 2 Jarman on Wills, 236, 237, 317, 310 ; Co. Lit. 223 a, 16—Co. Litt. secs. 361, 362.

ROBINSON, C. J., delivered the judgment of the court.

There is no question that the devise to John McIntyre, "to hold to him and his heirs forever," created an ordinary estate in fee simple, with the usual power of alienation in the devisee, as much as if the word "assigns" had been added, which word is not material to be inserted. And if nothing had been said qualifying the devise except a condition that the devisee should not alien, then it is equally clear that such condition would have been void, as being repugnant to the nature of the estate devised, and a restriction in its nature opposed to the policy of the law ; but when the testator, instead of simply attempting to annex such a condition to the estate in fee simple previously devised, added, "my will is that none of my sons shall have power to sell or alienate the lands thus bequeathed to them respectively, but they shall transmit from father to son or the next nearest heir, so that it may always be preserved in the family," he created by that explanation of his intention an estate tail by implication, because, though he had

not said at first that he devised to his son and the heirs of his body, yet this qualification of his devise in the following part of his will, shews that he used the word heirs in that sense, and thereby created an estate tail. This being so, we must hold that he meant nothing more by his restriction from alienation than the restriction which the very nature of the estate implies: the devisee is placed in the same situation as other tenants in tail, and we cannot say that there is anything against law in that.

At first it is a natural impression to derive from reading such a will, that the prohibition against alienation is total and unqualified; for where the testator says that the estate must be transmitted from father to son or the next nearest heir, he directs that it shall descend exactly as it must descend where there is no power of alienation; but it is quite clear upon numerous authorities, that we can only look upon the latter words as having merely the effect of making that a devise in fee tail which would otherwise have been a devise in fee simple.

I refer to *Dutton v. Engram*, Cro. Jac. 427; *Chadock v. Cowley*, Cro. Jac. 695; *Chapman's case*, Dyer 333; *Brice v. Smith*, Willes 1; *Roe v. Avis et al*, 4 T. N. 405; *Co. Litt.* 233 (a); *Doe dem. Gill v. Pearson*, 6 E. R. 178; *Shepperd's Touchstone*, 129,; 3 *Leonard* 182. In *Littleton*, sec. 362, it is said, "Also if lands be given in tail (as I take the land here to be) upon condition that the tenant nor his heirs shall not alien in fee nor in tail, nor for term of another's life, but only for their own lives, &c., such condition is good, and the reason is for that when he maketh such alienation and discontinuance of the entail, he doth contrary to the intent of the donor, for which the statute of William II. chap. 1, was made, by which statute estates in tail are ordained."

This shews that the restriction in this will is only such as distinguishes estates in tail, and is not an illegal restriction. It is plain there is nothing against law in this condition as we must construe it; though the preceding section in *Littleton* would make it necessary to hold the condition void if the land could be looked upon as being devised in fee simple.

The plaintiff in this case is entitled therefore to the *postea*, for the devisee in fee tail could not devise the land away from his heir in tail.

Per Cur—*Postea* to the plaintiff.

RUSSEL AND WIFE V. GRAHAM.

*Altering record without leave, after it has been entered with the clerk of assize—
Setting verdict aside thereon.*

Where a *Nisi Prius* record, when entered with the clerk of assize, terminated with a transcript of the pleadings and contained no award of *venire*, no *jurata*, or day of *Nisi Prius* given, and after it had been some days in this state was withdrawn from the clerk of assize by the plaintiff's attorney, and altered, by adding what was necessary, without leave—the *Court*, upon application in term setting out these facts, set aside the verdict.

Declaration: covenant upon a stipulation in a lease to give up possession to the lessor when the term shall expire.

Plea: *non est factum*.

Verdict for the plaintiff, 10*l*.

The defendant moved to set aside the verdict for irregularity; and his ground was, that when the *Nisi Prius* record was entered with the clerk of assize it terminated with a transcript of the pleadings and contained no award of *venire*, no *jurata*, or day of *Nisi Prius* given, and that after it had been some days entered in this state it was withdrawn from the clerk of assize by the plaintiff's attorney, and altered, by adding what was necessary, without any leave obtained for that purpose, or any consent of the opposite party.

It was objected, when the cause was called on for trial, that these alterations had been expressly made in the record, without authority, and it was urged that under such circumstances the cause could not properly be tried; but it was held that the judge sitting at *Nisi Prius* could only look at the record as it stood, and if he found all right there, the defendant must be left to apply afterwards to the court to set aside the verdict on account of any alleged malpractice.

This objection was accordingly taken as a ground for setting aside the verdict.

ROBINSON, C. J., delivered the judgment of the court.

We think that the rule must be made absolute. It may

be, as the plaintiff's attorney has alleged in shewing cause against this rule, that it has been a common practice for attornies to pass the record with the deputy clerk of the crown and have it marked by him, while it contains no more than a full transcript of the pleadings, down to the completion of the issue ; and that the entries of award of venire which must follow of course, and do not require to be authenticated by him, as they are not to be compared with anything in his office, are afterwards added by the attornies themselves. However this may be, the record must be always presumed to be in a complete state and out of the attorney's hands when once it is entered with the clerk of assize, who does the duty here of judges marshall, and we cannot admit that any alteration can be made in it afterwards for any purpose, without authority. It might lead to great abuse ; and the case of *Dickenson v. Plaisted*, 7 T. R. 474, shews that the courts are scrupulous in preventing any unauthorised alterations of their records.

We regret the necessity of setting aside a verdict for this cause, and trust that such an irregularity will not again occur.

Per Cur.—Rule absolute.

BROWN V. DALBY.

Civil action for seduction—Felony proved—Acquittal of defendant.

Whenever, in a civil action for seduction, it turns out upon trial that the act complained of was not merely a trespass, but a felony, the learned judge must direct an acquittal. Held however, *Per Cur*—that in this case, the evidence (as given below), being considered unsatisfactory, the learned judge was justified in not directing a verdict for the defendant.

Case for seduction of the plaintiff's daughter.

Plea "not guilty."

The only evidence given upon the trial was that of the plaintiff's daughter, whose seduction was complained of. After stating that she had lived in the defendant's service about seven months—that he keeps a tavern at Richmond Hill—that she is 21 years old—that she had a child in January last, of which the defendant is the father—and that the connection between her and the defendant took place while she was living in his service,—some questions were

put to her by the learned judge, in answer to which she swore as follows :—"The connection took place upon a Friday, when the defendant was alone in the house with me. I was scrubbing the ball room; he came in and shut the door—he locked the door; he threw me down on the floor and used me shamefully; Mr. Linfoot's tavern opposite was the nearest house. I did not scream; he threatened that if I screamed or made any alarm he would be the ruin of my life. I did not tell my father or mother till after I left, for he threatened me if I should tell. I struggled with him and slapped him in the face, but it was of no use, he had the door locked upon me. When Mrs. Dalby came home I said nothing. The connection was without my consent and against my will. She added that another girl who served in the family was at that time away, and the children were at school, and that she durst not cry out, and that the windows of the room were not open; that she tried to get away, and the clothes were torn from her in the effort; that the defendant's wife returned the same day, but that she, the witness, said nothing to her. She swore also that the defendant never would allow her to go home—(that is, for some months, for she did leave the defendant's service and return to her father before the child was born)."

The learned judge directed the jury upon this evidence, that if they believed all that the witness had said according to its most obvious meaning, a felony had been committed, and then this civil action could not be sustained; but that if they received the impression that the resistance was so feeble as to be but a shew of resistance, the case might be one of seduction.

Both parties objected to this charge—the defendant contending that since the plaintiff would not accept a nonsuit, the jury should be directed expressly to find a verdict for the defendant, as a felony had been proved by the only witness examined.

The plaintiff insisted that even if the evidence did establish that a felony had been committed, still the plaintiff had his civil remedy.

The jury, on the direction above stated, found their verdict for the plaintiff, 65*l*.

The defendant moved for a new trial on the law and evidence, and for misdirection.

ROBINSON, C. J., delivered the judgment of the court.

We have no difficulty in determining that this verdict should stand. No doubt it is a clear principle of law, that whenever in a civil action for seduction, it turns out upon the trial that the act complained of was not merely a trespass but a felony, it is proper to direct an acquittal; for the civil injury merges in the higher offence, and the policy of the law is that the party wronged must first bring the offender to justice for the crime, before he seeks compensation to himself by a civil action for damages. When, therefore, in any such case, the fact appears to be that a felony has been committed, and there is no evidence to lead to any other conclusion, the judge is bound to direct an acquittal, not on account of any claim the defendant has to be held innocent of the trespass, but out of regard to the policy of the law, which makes that the judges' duty.

Here, however, the learned judge who presided, considered that he could not say with truth that there was no reason to doubt that the act was felonious; for although the only witness who spoke to the fact gave it that character, yet the same witness stated various attendant circumstances which seemed difficult to be reconciled with the belief that the defendant had accomplished his purpose by violence and against her will. It was necessary to give the whole story to the jury as she stated it, and the jury were at liberty to draw their conclusions from it. If, for instance, the witness had described the act as having taken place in the same room where several other persons were sleeping, who could have been easily aroused by her calling, she might still have chosen to say that the act was committed violently and against her will; but the jury, while they believed the other parts of her statement, might disbelieve her in that part.

If, as was the case in *Vincent v. Spragge*, which was before this court in Trinity term, 10 Vic. (a), the only wit-

ness examined had proved the act to have been feloniously done, and there had been no circumstances sworn to by her which seemed inconsistent with such a relation—nothing that could make the disbelief of it otherwise than purely arbitrary—the directing a nonsuit without submitting the case to the jury, could not be deemed wrong; but here the learned judge having seen in the facts related some reasons for doubting the truth of one particular part of the witness's statement, and having left its credibility to the jury not without ground for doing so, and the jury having discredited the statement that such force was used as is necessary to constitute felony, gave their verdict for the plaintiff.

We do not consider that under such circumstances, it lies in the mouth of the defendant to object to this verdict on the ground that the jury were bound to believe that he had committed a greater wrong than he was charged with, and that they took a too favorable view of his conduct. We think the jury were well warranted by the evidence in discrediting the girl's statement that she was wholly under the influence of force or fear, as she declared herself to be.

Per Cur.—Rule discharged.

CUNNINGHAM V. RICHARDSON.

Averment of an agreement founded upon a past consideration—held bad.

An agreement declared upon in the following manner was held to be bad—as disclosing an agreement void in law for want of a legal consideration to support it:—“That it was amongst other things agreed, that in consideration that the plaintiff had leased from the defendant certain lands at 5s. per acre, the defendant undertook and promised that he would, within a certain time, build a house and barn on the premises so demised; and that for every acre of land cleared and fenced in fields not exceeding $7\frac{1}{2}$ acres, by the plaintiff, he, the defendant, should pay to the plaintiff 3*l.* for every acre of land so cleared and fenced as aforesaid.”

Declaration: Assumpsit upon a special agreement, averring “that it was amongst other things agreed, that in consideration that the plaintiff had leased from the defendant certain land at 5s. per acre, &c., the defendant undertook and promised that he would, within a certain time, build a house and barn on the premises so demised; and that for every acre of land cleared and fenced in fields not exceeding $7\frac{1}{2}$ acres, by the plaintiff, he, the defendant, should pay

to the plaintiff 3*l.* for every acre of land so cleared and fenced as aforesaid," and averring breach in not building the house, or paying for the land cleared.

To this declaration the defendant demurred, upon the ground that no good legal consideration for the defendant's promise appeared upon the face of the declaration.

Cameron for the demurrer. He cited 6 M. & W. 458; *Belcher v. Cook*, 4 U. C. R. 44.

Bell contra. He cited Cr. Eliz. 880.

ROBINSON, C. J., delivered the judgment of the court.

There is no question that this declaration, so far as regards the building of the house and barn, is founded on an agreement, which, as the declaration sets it out, is not supported by a legal consideration, and is therefore invalid.

In the case of *Belcher v. Cook*, in this court, 4 U. C. R. 401, the distinction between past considerations, of this description, which can support no new contract, and past considerations such as are in their nature continuing, is noticed, and the judgment rested on that difference. *Kaye v. Dutton* (*a*), *Granger v. Collins* (*b*), *Brown v. Coppen* (*c*), *Jackson v. Cobbin* (*d*), are all cases in which the agreement was held to be *nudum pactum*, when made under circumstances like the present, because not shewn to be supported by any consideration.

Nothing can be plainer than the principle of those decisions.

What the plaintiff sets out here is, that in consideration that the plaintiff *had leased* from the defendant certain land at 5*s.* per acre, the defendant undertook that he would, within a certain time, build a house and barn on the premises so demised. Now, in consideration that the plaintiff had leased, imports very clearly a past consideration, and how long past we cannot tell—neither indeed is it material. It is consistent with this statement of the case, that a year after the lease had been made, and the contract of demise had been complete, the one getting the term, and the other being entitled to the stipulated rent as the whole consideration on which the lease was granted, the defendant might

(*a*) 8 Scott 495. (*b*) 6 M. & W. 458. (*c*) 1 M. & W. 567. (*d*) 1 Dowl. N. S. 96.

have engaged that he would do something more than he was bound to do, namely,—that he would build this house and barn on the premises. If he did promise to do that, nothing can be clearer than that a promise made under such circumstances would be purely a gratuitous promise.

When the former transaction about the lease was closed, each, for all that appears, had already got from the other, in their mutual stipulations, all that was contemplated, and there remained nothing behind that could form a valuable consideration for any further promise. It might as well be averred that in consideration that the plaintiff had leased to the defendant certain land at 5s. per acre, the defendant afterwards promised to pay him 10s. per acre; or that in consideration that A. in 1848 had sold to B. certain goods for 100*l.*, B. undertook in 1849 that he would pay him 50*l.* more for the goods.

It is reasonable to suppose that in fact the agreement between these parties had not been completed, as the declaration imports, before these stipulations were made, and that the whole was one contract, and not that the undertakings declared upon were superadded after the contract for letting had been concluded; but unfortunately, if that be the case, the declaration does not so state it, but refers to the contract of demise, as some thing that had already taken place, and to which therefore there would seem to be superadded conditions made without any good consideration, and therefore not binding.

In respect to the engagement to pay 3*l.* per acre for land cleared during the term, that seemed at first not to stand on the same footing; and I think we might perhaps look upon it that the defendant was undertaking to pay the plaintiff 3*l.* per acre for such land as he might thereafter clear, which would carry with it the idea of full value to be received; for the clearing of each acre would form the consideration for the 3*l.* to be paid. That is clearly so in effect and in substance; but the difficulty here again is, that the plaintiff has not so declared as to rest the defendant's promise upon the true consideration—he has averred as to this undertaking, as well as the others, that it was in consideration

that the plaintiff had leased from the defendant certain land at a certain price, that the defendant made this promise to pay 3*l.* per acre for such land as the plaintiff should clear; whereas it ought to have been merely stated as inducement that the plaintiff had leased certain land from the defendant, and that in consideration that the plaintiff would, during the term, clear such portion of the land demised, not exceeding &c., as the defendant might desire him to clear, the defendant undertook to pay him for any land which he might so clear at the rate of 3*l.* per acre.

If it were objected after verdict as a ground for arresting judgment that this, as now stated, was a bad statement of a contract, because based wholly on a past consideration, I do not say that we might not properly hold that the intent sufficiently appeared to enable us to say that a good consideration was shewn; but having to decide on this declaration upon a special demurrer, we think we must hold it bad, as expressly grounding the whole of the promise on the past consideration of taking the lease.

Per Cur.—Judgment for defendant on demurrer.

BANK OF B. N. AMERICA V. JONES ET AL., EXECUTORS, &c.

Executors of Indorsee v. Indorser of a note—The necessity of averring in declaration a promise to pay, by executors.

In an action of assumpsit, brought by an indorsee against an indorser of a note, the declaration, after averring the indorser's liability to pay, need not aver that he *promised* to pay.

If, however, the party sued be the *executors of the endorser*, instead of the endorser himself, and the note has become due after the death of their testator, a promise to pay *by the executors* must be stated in the declaration.

This was an action on a promissory note, made by Donald Bethune, payable to D. J. Smith or order in three months, and indorsed by the defendant's testator, who died before the three months had expired.

The declaration stated the non-payment by Bethune, and notice to the defendants as executors, and averred that they thereby became liable to pay to the plaintiff the amount in the said note specified.

The declaration did not contain any statement that they promised to pay, and upon this ground the defendants demurred.

E. Jones for the demurrer. He cited 2 Star. 793; 3 Bing. 501; *Harding v. Hibbert*, 4 Tyr. 789; 2 M. & W. 56; 9 M. & W. 320; 2 M. & W. 734; 11 M. & W. 474, on which he relied.

A. Wilson contra. He cited 9 M. & W. 321, as questioning 3 Bing. 501; 1 Lord Ray. 368; *Acheson v. Hill*, U. C. R.; *Whitney v. Wood*, 5 U. C. R. 572; *Masson v. Hill*, 5 U. C. R. 60; 15 M. & W. 277; 1 Chs. Pl. 375; 12 M. & W. 564; 6 M. & W. 317; *Jarvis's Rules*, 57; *Cameron's Rules*, 52; 7 Taunt. 581; 7 M. & W. 491; 5 M. & W. 437; 4 M. & W. 338, 488; 2 Dowl. 208.

ROBINSON, C. J., delivered the judgment of the court.

This is in accordance with the form sanctioned by our rule of court Easter 5 Victoria, in the case of an indorsee suing an indorser of a note. The action here is between indorsees and the executors of their immediate indorser. The English form of declaration, under the new rule, by indorsee against indorser, is similar.

We cannot hold a declaration to be insufficient, which conforms to the rules; and in an ordinary case, this would clearly be good. We have only then to consider, whether, as this is an action against the executors of an indorser on a note, which became due after the death of their testator, a variation from the general form is on that account necessary.

In the case of *Masson v. Hill et al. (a)*, in this court, we had occasion to consider a declaration against the executors of a deceased indorser of a note of hand, which fell due after the death of the indorser. There the declaration did contain what this wants—namely, an averment of a promise by the executors to pay the note. The defendants denied that promise; and the question was, whether the promise so laid was a traversable averment or a mere inference of law arising upon the legal liability, not necessary to be proved, and therefore not admitting of a denial. We all held it was not traversable, and that the plea of non-assumpserunt was bad. Consistently, then, with that judgment, we must hold that the promise, which the defendants insist ought to have been laid in this declaration, would have meant nothing if it had been inserted.

(a) 5 U. C. R. 60.

That, however, does not shew that for form's sake alone a promise should not be laid. There are many cases in which pleadings are required to contain statements which yet are not traversable. My brothers, I believe, consider this to be one of those cases—and undoubtedly it is, if without an express laying of a promise by the defendants, it does not otherwise sufficiently appear that the plaintiffs are suing in *assumpsit*. It is on that point I have some hesitation.

It has been held that in a declaration against the drawer of a bill of exchange, a promise by him to pay must be stated in the declaration; and that seems reasonable; because without that, there is nothing but his mere legal liability apparent on the record, and so there would be nothing to distinguish such a declaration, in its form, from a declaration in debt.

But there the drawer does not promise by the terms of the instrument; he only gives a direction to another to pay. On the other hand, the maker of the note promises to pay by the instrument, and on that ground it has been held that a second promise need not be averred.

Then, as against an indorser, the law looks upon every indorser as a new maker; he says by his indorsement, "I promise to pay if, on due presentment and notice to me, the maker does not; and when the non-payment by the maker is averred, then his promise, already given, comes into force; and I do not see that there is any necessity for averring a promise to keep that promise; and it appears to me our forms given by the rules of court, require no such promise to be laid.

Then if so, how is it as regards the executors? They would stand, I think, in no other light than the executors of the maker of a note which should fall due after his death; and perhaps it would be right that a promise should be laid as by them, though a promise need not have been averred if the action had been against the person whom they represent. My brothers, I believe, think so, and they are, I dare say, right.

At any rate, the opinion of the court is, that the declaration

should have contained a promise, and it is of little consequence further than to establish a form of pleading which it will be known must hereafter be followed.

My doubt is, that as assumpsit may clearly, in many cases, be brought against an executor upon a promise by his testator, and without laying any promise by him, I do not see why it should not be in this case, if their testator, being indorser of a note, could be sued without laying a promise after averring his liability.

Per Cur.—Judgment for defendants on demurrer, with leave to amend.

MARTIN V. CORBETT, SHERIFF.

New trial—Absence of Counsel.

A new trial granted—upon conditions as to payment of verdict and costs which the plaintiff had recovered against the defendant, a sheriff, during the absence of his counsel.

Trespass for taking the plaintiff's goods.

Pleas.—1st. Not guilty.

2nd. That the goods were not the plaintiff's.

Verdict for the plaintiff, 21*l.* 0*s.* 3*d.*

The defendant moved for a new trial on affidavits only. These stated in substance that a material and necessary witness for his defence was ill at the time of the assizes, and stated himself to be unable to come; and that the physician who attended him declared that he was unfit to attend. He had since made an affidavit to the same effect.

The cause was postponed from Saturday till Monday, on account of the absence of this witness. On the Monday he was still absent, but the learned judge allowed the cause to be called on, and it was tried, undefended. The defendant's counsel left the court to attend to some other matter, and while the cause was going on, the witness in question (Snook) came into court, but then the defendant's counsel was absent, and did not return until just as the judge was charging the jury.

The affidavits were numerous, and were produced on the one side to show that the cause had been undefended from the circumstance that it was fully understood and

believed that the witness was too ill to attend, and that the defendant's counsel, in consequence, resolved not to enter upon a defence, and was absent till the trial was over; and on the other side to produce the belief, or, rather perhaps to strengthen a surmise which was insinuated, that the counsel was indisposed to enter upon a defence, being conscious that there was none—that he was absent without necessity, and that his client should not therefore be relieved.

ROBINSON, C. J., delivered the judgment of the court.

The learned judge who was present at the trial, can best judge how far all was done in good faith on both sides; and as he does not entertain the impression from what took place before him, that the defendant's attorney or counsel was acting evasively, I think we should interpose, in order to let the defendant into a defence.

It is expected generally in such cases that an affidavit should be produced from the witness whose absence occasioned the cause to be undefended, stating in substance what evidence he could have given, in order that the court may see whether there is any sufficient ground for granting a new trial. There is no such affidavit filed in support of this application, but it appears from a statement in one of the affidavits filed on the part of the plaintiff, that Snook has declined making any affidavit on either side, and in this case it is rather on account of the absence of the defendant's attorney and counsel than of the witness that we are asked to give relief.

The office of sheriff is attended with so much responsibility, and so many difficulties, that it is always desirable that he should have a fair chance of defending himself in actions brought against him for acts done in the discharge of his duty.

We grant a new trial on condition of the defendant paying into court, before the first day of next term, the amount of the verdict, and paying the costs of the last trial, and of this application; otherwise the defendant may enter up his judgment.

Per Cur.—Rule absolute on the terms above mentioned.

GORDON V. CLEGHORN.

Notice of trial—irregularity therein waived—Defendant's right to demur to replication concluding to the country.

A notice of trial naming Friday the 19th of May, instead of Friday the 18th, is an irregular notice, but if the defendant intends to rely upon it as such, he must give notice to that effect to the plaintiff *before the trial*, otherwise the irregularity will be cured.

The defendant, though the replication completes the issue, may refuse to be concluded by it, and if he thinks proper demur, provided he does so within the ordinary time of pleading. (See *Duncombe v. Fonger*, 4 U. C. R., 192).

Assumpsit on a promissory note of John Vord, dated the 11th of Sept. 1844, to the defendant or order, for £38 11s. 11d., payable in one week, endorsed by the defendant to one Levitt, and by him to the plaintiff.

Verdict for plaintiff.

M. Cameron moved to set aside the verdict for irregularity, with costs—the *nisi prius* record having been made up without inserting demurrers, which had been filed and served; and the notice for trial being given for Friday the 19th of May, instead of Friday the 18th of May, the true day, and because the *venire* was improperly awarded, being made returnable on first day of Easter Term, and from thence respited till the last day of the same term, unless her Majesty's justices should first come on the 18th May, which would be before the return of the *venire*; or for new trial on the law and evidence, or on merits on the affidavits filed.

The 4th, 5th, 6th and 7th pleas on the record, set up various special defences, founded upon alleged transactions and undertakings between the defendant and Levitt, the payee, alleging also that the plaintiff took the note without valuable consideration.

All these pleas concluded with a verification.

The plaintiff filed a replication on the 1st May to these four pleas, in which he traversed one by one the several facts set forth in the plea—a sort of informal replication of *de injuriâ*, concluding each plea to the country.

On the 12th May the defendant filed and served demurrers to the replication, but nevertheless the record was passed on the 18th May, and made up without inserting the demurrers—the plaintiff adding the *similiter*, not in the usual form, but merely adding at the end of all the replica-

tions "and the said defendant doth the like," which would seem to apply only to the last replication.

Levitt was examined on the trial, and swore that he gave full value for the note, and got full value from the plaintiff, to whom he indorsed it. The defendant did not make a defence.

The questions were, 1st. Upon the alleged irregularity of passing the record without inserting the demurrers therein. They were filed and served ten days before, but more than eight days after the replication.

2. Upon the irregularity of the notice of trial; and whether it was not waived by no notice of it, or of the intention to move being given to the plaintiff's attorney.

3. Upon the alleged defect in the *venire* awarded.

Weller shewed cause. The authorities cited by Mr. *Cameron* were—8 Jurist, 1122; 4 U. C. R. 192; by Mr. *Weller*—4 U. C. R. 192; 1 U. C. R. 340.

ROBINSON C. J., delivered the judgment of the court.

With regard to the *venire*, we need not determine whether what is objected to is indeed erroneous; for if it were necessary we shall allow that irregularity to be cured, by directing an amendment.

The *nisi prius* day is correctly stated on the record, and I do not see that there is anything wrong in the award of *venire*, if indeed it were necessary that any such award should be entered on record, when our statute provides for a jury being taken for the trial of the issue without any such writ.

The notice of trial was no doubt irregular, because it named a wrong day, being for Friday the 19th, instead of Friday the 18th of May, but the day is appointed by statute, which all persons are bound to notice, and therefore while the notice did answer the purpose of letting the defendant know that the plaintiff intended to go to trial at the next assizes, it could hardly mislead him as to the time of trial. It was an irregular notice, but such as made it necessary that the defendant, if he intended to rely upon the irregularity, should, before the trial, have given notice to that effect to the plaintiff. By his keeping it for a long time,

and allowing the plaintiff to go to the expense of a trial without any intimation of the irregularity, he waived it, and cannot now take the objection.

The more substantial question is that arising from the defendant having filed and delivered demurrers to the plaintiff's replications, which the plaintiff however did not notice, but made up and passed his record, as if no such demurrers had been filed. The plaintiff in doing so relied probably on the decision of this court in *Duncombe v. Fonger*, 4 U. C. Rep. 192. This case comes within the principle of that decision, and should, we think, be governed by it.

As the pleadings stood on the 1st May, when the plaintiff filed and delivered his replications, the issues were complete, and all those replications concluded to the country, and being merely denials, perhaps informal of the defendant's pleas. But no doubt, though the plaintiff could properly add the similiter, and could consider the pleadings closed, and could not be expected to demand a rejoinder or to wait for one, yet undoubtedly (as was explained in *Duncombe v. Fonger*), the defendant still had it in his power to refuse to be concluded by the replications, and was entitled to demur to them if he found occasion to do so; but then he had not an unlimited time for demurring.

Here he did nothing till after the full time for pleading, even after a demand, would have expired. I do not see that the case is distinguishable from *Duncombe v. Fonger*.

No particular merits are sworn to. The demand is upon a promissory note, and is not large. The evidence on the trial placed the plaintiff's claim on clear grounds while uncontradicted, and the defendant seems to have been lying by to take advantage of supposed irregularities rather than meet the plaintiff fairly on the merits.

Per Cur.—Rule discharged.

DOE DEM. YAGER AND EX DEM. DEPUE V. DANIEL STEWART.

New trial granted to the defendant in ejectment on the ground of surprise—the plaintiff claiming title by an estoppel, which the defendant was not prepared to meet.

Ejectment for lot No. 7, 2nd concession of Rainham.

It appeared that Taylor Stewart, a loyalist, came into Upper Canada, and received a grant from the crown for the land in question, in 1797; that he died in Upper Canada intestate and without issue, leaving an elder brother, Joseph, who was born in the colony of New York in 1769, and continued to reside till his death in that country after it became an independent state, thereby losing his character of a British subject; that his next eldest brother, James, was a British subject resident in this province, and in 1846 he conveyed to his son the defendant, who also is his heir-at-law.

On the other hand, the plaintiff set up a title derived under Joseph Stewart the alien, who, on the 6th September, 1828, assuming to be capable of inheriting this property, made a deed of it in the United States, where he lived, to one David Depue, an alien, residing then also in the United States.

This David Depue made a mortgage of this property in 1836 to two aliens in New York by the name of King; and they, in 1841, by desire of David Depue, reconveyed to Peter Depue, one of the lessors of the plaintiff, who is also an alien living in the State of New York. In 1846 Peter Depue conveyed to Leonard Yager, the other lessor of the plaintiff.

Verdict for the plaintiff on the demise of Leonard Yager.

Cameron, Q. C., moved to enter a nonsuit on the leave reserved, or for a new trial on the law and evidence, and for misdirection, and on affidavits.

J. Boulton shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

It is plain on this statement of facts, that a verdict could not be rendered on the ground of legal title on either demise, on account of the alienage of Joseph Stewart and David Depue, who assumed to be capable not only to hold

but to convey this real estate in Upper Canada, and to convey it to aliens.

The double demise was not made, I take it for granted, under the idea that the objection of alienage under the facts of such a case would not be equally fatal to the recovery by Yager or by Depue, although Yager, who took the deed in 1846 is admitted to be a British subject. But a demise seems to have been laid by Peter Depue with the intention of setting up an estoppel against the objection of alienage on the part of the defendant as applied to Depue, by endeavouring to shew that the defendant went into possession for or under Depue, and could not therefore take exceptions to his title.

It was only on the ground of the evidence that was advanced to this effect that the plaintiff was allowed to recover; and now it is shewn, and not denied, that in a former ejectment for this same property, brought by Daniel Stewart, the now defendant, against Yager, he (Daniel Stewart) recovered and actually gained possession under the judgment, which must of course put an end to the application of any such principle as between Daniel Stewart and Yager, or between Daniel Stewart and Depue, who assigned to Yager; because the possession, which it was contended upon this trial Daniel Stewart was bound to restore to Yager or Depue before he could put either to proof of title, had been interrupted and was at an end.

But when the estoppel was urged upon this trial, the defendant, as he swears, was not prepared to meet it, being taken by surprise by such a defence, for which there really was no ground under the circumstances, and which therefore he could not expect would be set up.

Not having the record of recovery in ejectment to produce at the moment, he could not prevent the answer to the defence from succeeding; but it is plain that the facts, as the defendant now states them to be, did not admit of such an answer.

We, therefore, upon the ground of surprise, grant a new trial with costs to abide the event.

Per Cur.—New trial, costs to abide the event.

VANLEUVEN v. OWEN VANDUSEN & CONRAD VANDUSEN.

Note payable to A. B., or bearer—endorser—his liability to holder—averments.

A. made his note payable to B. or bearer. Before the note was delivered to B. D. endorsed it—B. sued both A. and D., averring that A. made the note; &c., that the note was then delivered, &c., to D., who became the lawful bearer thereof, who then, as such lawful bearer thereof, endorsed and delivered the same to B. *Held, per Cur.*, that under this form of note, and the averments as laid—D., the endorser, was liable to B., as the holder of the note.

The declaration in assumpsit contained four counts. On the 1st and 2nd a verdict was given at the trial for the defendants; and on the 3rd and 4th counts for the plaintiff 81*l.* 3*s.* 9*d.*

The 3rd count stated that Owen Vandusen, on the 6th of Dec. 1843, made his promissory note, promising to pay to one Henry Vanleuven or bearer 50*l.* in twelve months; that the said promissory note was then delivered, transferred and assigned to the defendant Conrad Vandusen, who thereby then became and was the lawful bearer thereof, and the said Conrad Vandusen, so being such lawful holder and bearer of the said promissory note in this count mentioned, *then* endorsed and delivered the same to the plaintiff; that the said Owen Vandusen did not pay the note when duly presented; of all which the said defendants then severally had due notice; by means whereof the defendants then became jointly and severally liable to pay, &c., and being so liable, afterwards jointly and severally promised the plaintiff to pay him the same.

The 4th count charged that Owen Vandusen, on the 7th of December, 1843, made his promissory note to one Henry Vanleuven or bearer, promising to pay him 12*l.* in twenty-four months, and laid the other facts of endorsement, notice, &c., precisely as in the 3rd count upon the other note.

The defendant Conrad Vandusen pleaded to the 3rd count, 1st. That the note was not delivered, transferred or assigned to him, the said Conrad Vandusen, as in that count alleged.

2ndly. That he did not endorse that note to the plaintiff, as in that count alleged.

3rdly. He denied that the note was presented to Owen Vandusen.

4thly. He denied notice of non-payment.

To the 4th count the defendant, Conrad Vandusen, pleaded the same pleas as to the 3rd.

And he pleaded to both counts, that there never was any value or consideration for his endorsement of the said notes in these counts mentioned, or for his paying the amount of the said notes, or of any or either of them, or any part thereof, and that the plaintiff always held and now holds the same without value or consideration. To which last plea the plaintiff replied *de injuria*, &c.

The plaintiff did not give evidence of presentment to the maker, and of notice to the defendant Conrad Vandusen, as endorser; but he relied on a letter from that defendant written in 1846, and on admissions in conversations proved by witnesses, as shewing that he acknowledged himself to be liable on the notes, and promised to pay them. This evidence was left to the jury as furnishing proof of presentment and notice, or at least of waiver of objection on that ground; and as to the evidence on the first issue on the 2nd and 3rd counts, the learned judge reserved its effect for the consideration of this court.

The notes produced were such as were set out in the 3rd and 4th counts; and it was proved that the endorsement by Conrad Vandusen was made before they were given to the plaintiff.

The defendant, Conrad Vandusen the indorser, by *Henderson*, obtained a rule for a nonsuit on the leave reserved at the trial, or on the law and evidence. He contended that as Henry Vanleuven was the payee of the note, the defendant Conrad Vandusen could not otherwise derive title to the note than by transfer from him, and that he being primarily liable as first holder, no action could lie by him against the endorser. Also, that the defendant Conrad Vandusen was entitled to succeed upon the first and second issues for that reason.

Kirkpatrick, Q. C., shewed cause.

The cases cited were—Booth v. Barclay, 6 U. C. R. 215; 4 T. R. 470; 1 H. Bl. 605; Story on Bills, 60, 222; Byles on Bills, 116; Story on Promissory Notes, 474; 15 M. & 208; 2 B. & C. 483; 1 Cr. M. & R. 439; 13 M. & W. 811;

Thew v. Adams, 3 U. C. R. 361 ; Chitty on Bills, 127, 497.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that there is nothing in these objections, and also that the verdict on the 3rd and 4th counts was properly given for the plaintiff on all the issues.

When a note is made payable to A. B. or bearer, it may be at once delivered over to any person as bearer, who takes then an interest in it directly under the promise contained in the note itself, which is to pay A. B. *or* to pay the bearer. The payee may be an imaginary person, from whom any actual transfer is out of the question. These two counts merely aver that the notes described in them were, upon their being made, transferred and delivered to this plaintiff, who became thereby the bearer, as undoubtedly he must have done, and his right to be regarded as bearer is not in any manner impeached. The substance of the statement is this, that he held the note as bearer ; it is not averred that the payee delivered it to him, nor was such an averment necessary ; it would frequently be inconsistent with the truth as regards such notes, as daily experience shews.

Then the defendant being bearer, indorsed and delivered the notes over to the plaintiff, as these counts state, and his indorsement was proved, which, as in all other cases, entitles the plaintiff, being holder of the notes, to treat them as being indorsed directly to him, whether the fact were so or not, unless indeed there be special circumstances in the case which make it material to notice some intermediate transfer, and no such circumstance is shewn here.

The fact, that the plaintiff who sues as indorsee is also payee of the note (admitting the identity of the persons), would be no objection in this case, because, not having indorsed the note, he is not liable to any one upon it. The defendant can have no remedy over against him to recover the money back, on the ground that he is primarily liable, for he is not liable at all upon the note, and could as well take it by transfer from this defendant after he became the bearer of it as any one else could, although his name may be in the note as the payee.

Of course this defendant need not have indorsed these notes for the purpose of transferring the interest in them, but having done so, it is clear that he thereby has made himself liable as indorser as much as if the notes had been payable to order. The effect of this verdict is only to carry into effect what plainly was intended by the parties, namely, that Owen Vandusen should make the notes, and Conrad Vandusen indorse them, to make them a satisfactory security to this plaintiff, who was to take them as the holder after they had been so indorsed.

Per Cur.—Rule discharged.

ROSS ET AL. V. McMARTIN, SHERIFF, &C.

Sheriff—Appointment of Successor—when the old Sheriff can be said to be out of office.

A writ of *fi. fa.* was delivered to the sheriff on the 21st of November, 1847, returnable in Hilary Term, 1848. On the 9th of December, 1847, the sheriff tendered to the government his resignation of office. On the 14th of the same month it was notified to him that his resignation had been accepted, but his successor had not been appointed till after the return of the writ, which was made in the interval. The deputy sheriff who remained in the office to wind up the old business made his return to the writ; and in an action against the sheriff for a false return, it was held *per Cur.*—that under the facts proved, the sheriff must be considered as in office at the return of the writ, and liable upon the return made.

Action for false return on a writ of *fi. fa.* on several counts.

13th. Plea by the defendant, admitting that he was sheriff of the Eastern district when the *fi. fa.* was delivered to him, but that before the return thereof, and before he had done any thing upon the said writ, viz., on the 1st December, 1849, he ceased to be sheriff &c., and had not since been sheriff, —specially traversing that from the respective times of the delivery to him of the said writs or of any of them, until, and at the return days of the said writs respectively, or of any of them, he was sheriff of the said district.

Issue thereon.

The return indorsed on the *fi. fa.* was—

“By virtue of the within writ, to me directed; I have seized to the amount of 17*l.* 10*s.* 0*d.*, and left the same with the defendant, after having taken security for the same; and

the defendant afterwards made away with the said goods and chattels.

"The answer of

A. M. MARTIN, late Sheriff E. D.,

By PETER STUART, late Dep'y Sheriff, E. D."

The writ was returnable on the 1st of Hilary 1848, and was delivered to this defendant 24th November 1847. On the 9th of December 1847, the defendant tendered to the government his resignation of office, and on the 14th of December it was notified to him that his resignation was accepted, but his successor was not appointed till after the return of the writ which was made in the interval.

The defendant after his resignation became candidate at an election for a member of the Assembly, which office is by law made incompatible with the office of sheriff, and did not personally act as sheriff afterwards. Stuart, who had been his deputy, however, continued closing up the office business, and it was proved that he continued up to the time of the trial acting for the defendant in returning writs.

It appeared to the learned judge that the defendant had proved his 13th plea, and the plaintiff took a nonsuit, with leave to move against it.

Richards moved against the nonsuit on the leave reserved.

Vankoughnet shewed cause.

The authorities cited were—Hardruss, 476 ; Dyer, 195 ; (a), Cro. Eliz., 12, 365, 440 ; Watson on Sheriff, 78, 20, 1, 2 ; Sewell on Sheriff, 19, 20, 27, 28, 29, 30.

ROBINSON C. J., delivered the judgment of the court.

It is our opinion that the plaintiff is entitled to succeed in his application. I have had some doubt on the subject, because many of the cases which may at first sight be considered as authority for holding that a sheriff must be held to be in office till his successor is appointed, or till he has been in a formal and legal manner discharged from the office, are cases in which the question has been raised upon the validity of the sheriff's own acts, while he was himself not concurring in his own dismissal, and had not been, as he contended, conclusively discharged. But nevertheless,

when we consider what is said in books of the highest authority of the manner in which a patent-office,—which that of sheriff is in this county—may become void by surrender, as in Com. Dig. office K. 9 ; Dyer, 176 ; and how inconvenient it would be to the public that there should be any interval of time in which there would be no one to execute the processes of the courts which require to be directed to the sheriff ; we must feel strongly the necessity of being extremely cautious before we can admit that the office can be vacated, otherwise than by the death or actual removal of the officer by the appointment of another, or the formal surrender of the patent made, as the law intends it shall be made in such cases. It is only where this office has been vacated by death that our statute 3 Wm. IV., ch. 8, sec. 23, continues the deputy in office till the appointment of a new sheriff.

Against the mischief that might happen if the office could be made vacant by a mere verbal or written resignation, accepted in the same manner, and before any patent had issued superseding the officer and appointing another, there is no provision made ; and we have therefore no warrant for relaxing from the strictness with which the law guards the administration of justice, by exacting a due regard to legal forms and solemnities as affecting the tenure of office of justices, sheriffs, and others connected with the courts ; and there is besides in this case the fact proved, that the person by whom the return was signed in the sheriff's name, was at and after the time of making that return employed by the defendant in winding up the affairs of the office, and constantly making returns for him on process, which had been directed to him (the defendant).

If there were no such strict principle of law as I have stated, it might still I think be held upon such evidence as was given in this case—that although the defendant, contemplating a retirement from office, had written officially to desire that he might be permitted to resign, and had received for answer that his wish was acceded to, yet that he kept the matter in suspense for purposes of convenience to himself, and until he had wound up some outstanding business

in his office ; or that, if he regarded himself as no longer sheriff, still he was content to be bound by such returns as should be made in his name by the person who had executed the process for him, and whom he still constantly employed in doing whatever remained to be done respecting them. This however might only be a consideration applying to the substantial merits of the case, and such as could not be entertained perhaps on these pleadings, when issue is joined on the very fact averred, of the defendant being actually sheriff at the time the return was made. But on the other ground, at any rate, we are of opinion that the nonsuit should be set aside.

Per Cur.—Rule absolute.

DOE ON SEVERAL DEMISES OF PARK, OF HUNT AND OF HENRY DESRIVIERES AND HIS WIFE, AND OF AUSTIN CUVILLIER AND HIS WIFE V. REUBEN HENDERSON.

Due taking of commission to examine witnesses—Competency of widow as witness to prove her late husband's title to land—Power of circuit judge in L. C. to examine married women—Where there is an heir in existence capable of inheriting but for a nearer heir, what evidence must be given to prove the existence of the nearer heir.

The affidavit of due taking of a commission to examine witnesses, though not entitled in the court, or in the cause, is nevertheless, when annexed to the commission under the seal of the commissioners, and referring to it, a sufficient affidavit of the due taking of the commission.

A widow woman, notwithstanding her right to dower, is a competent witness to prove the pedigree of her husband and his title to land.

A circuit judge in Lower Canada, under the act 7 Vic., ch. 18, sec. 16, has the power of examining married women respecting their consent to convey their estate.

Where title is made under a near relative of the person last seised, whose affinity to him is clearly proved, and who was undoubtedly capable of inheriting, and who would inherit unless a nearer heir is shewn to be in existence, such title cannot be displaced by vague evidence, tending to shew that there is possibly a nearer heir. It should be shewn that there is some one in existence, male or female, representing the alleged elder branch of the family.

Ejectment for lot No. 7 in the 6th concession of Woodhouse.

The crown granted this land by letters patent on the 20th of November, 1798, to Ensign Henry Hay. He died intestate and without issue, more than 35 years ago. He had two brothers, John and Richard, of whom John was the elder. Both were younger than Henry ; and all were sons of a British officer, who was stationed at Fort Detroit, as I understand the evidence, at the time of their birth, and was in the service of the British government as governor of that

fort. This was in the period between the conquest of Canada from the French, and the treaty between Great Britain and the United States of America in 1793, by which the thirteen British colonies on the continent of North America were declared independent.

The lessors of the plaintiffs, Park and Hunt, claimed (under several demises to each of them) from the daughters and co-heiresses of Richard, the younger brother of Henry the patentee, from whom they took a conveyance by bargain and sale on 27th Sept., 1847, by deed, executed jointly with their husbands Desrivieres and Cuvillier, whereby, in consideration of 150*l.*, they, the said daughters and co-heiresses of Richard Hay and their husbands, conveyed to Park and Hunt in fee simple all the lands granted by the patent to Henry Hay, being 1500 acres of land in Woodhouse.

Upon this deed there was a certificate indorsed of Mr. McCord, a circuit judge in Lower Canada, of his examination of the two married women, and of their voluntary consent to alienate their estate by this deed. This certificate was given in November, 1848, and was signed by Mr. McCord as circuit judge, acting as judge of the Queen's Bench in Lower Canada under the statute of Canada 7 Vic., ch. 18, sec. 16, which gave power to circuit judges in Lower Canada, during the sitting of the judges of the Queen's Bench in the Court of Appeal, to exercise the same powers and authority as if they were appointed for the period assistant judges of the Court of Queen's Bench.

It was apprehended perhaps that doubts might arise respecting the sufficiency of Mr. McCord's certificate, and therefore counts were added on the several demises of each of the co-heiresses and their respective husbands.

The proof of heirship to Henry Hay was given by the evidence of his brother Richard Hay, upon examination before commissioners in Lower Cahada, where he resides; and a preliminary objection was taken to the sufficiency of proof of due taking of the evidence.

Annexed to the commission was a certificate under the hands and seals of the commissioners who took the evidence, headed by the proper style of the cause, and certifying the

due execution of the commission; also an affidavit of another person, that he was present at the examination of the witnesses under the commission thereto annexed, and that it was duly taken, according to the directions in the commission, on the day and at the place named in the affidavit. This affidavit was merely headed, "Province of Canada, District of Montreal, to wit."

The affidavit was sworn before the Mayor of Montreal. The commission was returned by the commissioners as duly executed, by indorsement under their hands and seals. The commission, interrogatories and answers were all united together by seals; and both interrogatories and answers were formally entitled in the court, and with the proper style of the cause. The objection taken was, that the affidavit of due taking was not entitled in the court or in the cause.

The learned judge allowed the case to proceed, subject to the exception. The evidence respecting the right of the daughters of Richard Hay, the younger brother, was to this effect:

The three brothers were born in Detroit, while their father was there as an officer of the British service. John, the next brother to the patentee Henry, was born about 1772; when John was about fifteen years old, which would be about 1777, and while Detroit was yet held by the British government, and was a British post, he left Detroit and went to the territory of Illinois, in the United States, where he continued to reside till his death: the particular place of his residence was not known to the witness, the widow of Richard Hay. She stated that he married in Illinois, and at his death left a large family of children, but could not say how many at present survive. She did not swear, indeed, that to her knowledge there was any child then surviving, nor did she state the name of any one of his children. Whatever children he had, she said, were all born in Illinois. She made no statement as to the time when John Hay died; she swore that she had never seen him, but that she had heard that he died in Illinois; that he had held two offices under the government of the United

States—those of collector and post-master—and had always acted as a citizen of the United States; but that he never returned to the British dominions after leaving Detroit (about 1787), when he was about fifteen years of age.

The witness swore that she was acquainted with these facts from his correspondence with his brother Henry, and with the other brother, Richard her husband, and from casual information from other persons, who said they knew him and his family, and also from letters written by a niece of John Hay to one of the witnesses's daughters, which letters she knew to be in the handwriting of the niece, but how long ago they were written she did not state.

She swore that Richard Hay, her husband, was born at Detroit while it was under British dominion, and where his father died, being, as she believed, still governor of Detroit; that Richard Hay went to Lower Canada when he was about eight years of age, and became a provincial surveyor; that his two daughters were born in Quebec; that he always resided in Canada, and died in Brockville in Upper Canada.

She repeated in her evidence—"the said John Hay is dead, as I have stated; he left issue, as I have also stated, who are living in the State of Illinois; but I cannot say how many survive." She could not state, as it seemed, where John Hay died, nor whether he survived Richard or not, but she swore that all three brothers were dead; that Henry died more than 35 years ago.

There was evidence that this defendant said in 1845 or 6 that he did not claim to own the land, and was ready to give it up whenever the lawful owner appeared, if he could not purchase it from him. He had been several years in possession. Other persons had at intervals occupied or used the land, which was lying vacant. There was no uninterrupted possession shewn for twenty years, or for any certain period, nor any privity between any of the successive occupants.

The learned judge considered, that independently of the question as to the capacity of John Hay to inherit, or to transmit to his children, and the right of any of his children

to hold, there was no evidence of there being any child of John in existence and claiming at all; and that unless the jury could find that there was such issue of John living, the plaintiff's title, as heir of Henry, would still be good; that the presumption was, that as no children of John were proved to have been heard of within seven years, there were none now living; and that if any were living, and advanced a claim to this land, they must shew the precise legal position of their parent and themselves, in order to establish their right to be preferred to the children of another brother.

The jury found for the plaintiffs on the demise of Park and Hunt, and for the defendant on the other demises.

**DOE EX DEM. SAME LESSEES OF PLAINTIFF V. ROWE, FIELDS,
RONALDS AND EDWARDS.**

Ejectment for lot No. 15 in the 5th concession of Woodhouse.

In this case a verdict was by consent given for the plaintiffs as in the former case, and on the same evidence, subject to the objections taken in the other, and to the opinion of the court upon the whole case.

**DOE ON SEVERAL DEMISES OF PARK, HUNT, DESRIVIERES AND
WIFE, AND CUVILLIER AND WIFE V. WALKER.**

Ejectment for north half of lot No. 2 in 2nd concession of Woodhouse.

In this case the same evidence was before the jury on the part of the plaintiffs as in the other two cases; and it was agreed that the effect of that evidence should be in like manner subject to the opinion of the court; and that the case, on the plaintiffs' part, should be subject to all the same exceptions.

For the defendant there was proved a deed of bargain and sale, made 16th January, 1815, by one John Bloomfield, described as of the town of York, merchant, to Henry Walker, father of the defendant, for this land, for a consideration of 125*l.*, not registered. What right Bloomfield had did not appear. Henry Walker went on the land about

1816, and made large improvements, and lived on it for some years, but left it before his death, which occurred in 1832 or 3, and left it, as it seemed, in consequence of hearing that the land belonged to the heirs of Mr. Hay, and that his title was denied.

The evidence seemed to shew that it then lay vacant for some few years, till the defendant and other sons of Henry Walker, after their father's death, went upon it and cultivated it, though there was some evidence that Henry Walker, after he ceased to live on it, still made use of a part of it, and his sons after him, without intermission. The evidence seemed stronger in favour of the supposition that it lay some four or five years waste.

The jury, however, found an unbroken possession for more than thirty years, and gave a verdict for the defendant.

SAME PLAINTIFF, SAME SEVERAL DEMISES, V. SOLOMON
WALKER.

Ejectment for the same north half of lot No. 2 in the 2nd concession of Woodhouse (defendant probably in possession of another part).

In this case the evidence was the same as in the last case, and the jury found for the defendant. It was agreed that their verdict should be subject to the event of the action against James Walker.

The same rule nisi had been obtained in both.

Freeman of Hamilton, with whom was *Galt*, obtained a rule for a new trial on the law and evidence, and for the reception of improper evidence. They cited the following cases—2 Ea. 312; 15 Ea. 293; 2 B. & C. 774; Jay's Treaty, 1794; 12 Jur. 76; 7 T. R. 761.

D. B. Read shewed cause. He cited 2 B. & C. 779; 5 B. & C. 771; 1 U. C. R. 37; 3 U. C. R. 293; 4 U. C. R. 369, 344; 5 U. C. R. 167; 1 T. R. 163; Lord Ray. 724; 1 Stark. Ev. 105; 5 U. C. R. 175; 1 Salk. 246; 12 Ea. R. 154; 2 Sch. & Lef. 621; 1 Taunt. 588; Plow. 88; 2 Ev. Stat. 334; 1 U. C. R. 70; 4 T. R. 514; 14 Ea. R. 331; 7 Ea. R. 290; 4 Taunt. 16; 10 Ea. R. 109.

ROBINSON, C. J., delivered the judgment of the court.

In the first of these ejectments, that against Henderson—we are of opinion that the verdict which has been given for the plaintiff on the demise of Park and Hunt must stand—whatever judgment we might think it proper to give upon the main question of the right to the inheritance, if the precise facts respecting John Hay and his children could be made to appear.

First, as to the objection that the evidence under the commission could not be properly read, it is not very reasonable to persist in it, after the evidence has been so extensively commented upon on both sides. The ground of this objection is, that the affidavit of due taking was not entitled in this court, and in the cause. We must be careful how we embarrass proceedings in this court, by exacting with a too rigid degree of regularity an attention to forms, such as may in many instances render useless evidence obtained from abroad at great expense, where there is no reason whatever to doubt that all has been in fact fairly executed.

The legislature, in the statute 2 Geo. IV., ch. 1, sec. 18, in providing that the evidence returned with the commission shall not be read, if it shall be made appear to the court before which the examinations are put in that the same have not been duly taken, seems wisely to have left a degree of discretion with the court; and, so far as the objection is concerned, we cannot, I think, hold that the examinations were not duly taken, when *an affidavit* of the due taking thereof is annexed to the examination and commissions, as the 17th clause requires, and annexed under a seal which, I think, we should take to be the seal of the commissioners. They, as well as the depositions, which are not entitled in this court, or in the cause, are all, by being thus annexed to the commission and referring to it, proceedings in this court and in the cause, and we ought not to exact more than the statute requires. There could be no difficulty in sustaining a prosecution for perjury on this affidavit, if the contents were not true.

Then, as to the objection that Mrs. Hay is not a competent witness, I confess that, so long as the having a direct

interest in the event of a suit is to disqualify a witness, it is hard to reconcile one's mind to the reception of the evidence in this case; for if, by her evidence upon the very fact of pedigree, she enables the plaintiff to recover as deriving title under her husband, whom she, by her evidence alone, would prove to have been seised of the estate of inheritance from his brother, the patentee—I do not see what reasonable doubt there can be, that by the same evidence she is establishing her own claim to dower out of the estate, since the plaintiffs in this ejectment could never be allowed to recover the estate by producing her evidence of her husband's seisin, and then to hold it free of her claim of dower, by denying that fact of her husband's seisin, which in this action they had called her to prove. Still it cannot be denied that she has no direct interest in the event of the suit, in this sense, that a verdict in this action would not *ipso facto* give her dower, and she does not directly lose or gain by the event. In Doe dem. Nightingale v. Maisey, 1 B. & Ad. 439, the very point has been determined in England, and we adhere to that decision, which seems not to have been questioned.

Another point was made in this cause, which respects only the validity of the conveyance from the daughters of Richard Hay to Park and Hunt—namely, that Mr. McCord, who certified that he had examined them, being married women, respecting their consent to convey, was not a judge of the Superior Court of Lower Canada, as required by the statute; but he was clearly made competent to do this act by the statute 7 Vic., ch. 18, sec. 16, being a circuit judge, and as such enabled by that statute to exercise the power of a judge of the Queen's Bench in Lower Canada during the terms of the Court of Appeal, when the judges of the Queen's Bench are sitting in appeal.

Upon the merits of the case I concur fully in the opinion expressed by the learned judge at the trial, that in a case of this kind, where title is made under a mere relation of the patentee, whose affinity to him is clearly proved, and who was undoubtedly capable of inheriting and would inherit unless a nearer heir is shewn to be in existence, such title

cannot be displaced by vague evidence tending to shew that there is possibly a nearer heir. It should be shewn that there is some one in existence, male or female, representing the alleged elder branch of the family.

Now, here, admitting for the moment that John Hay, being born a British subject, retained his character as such, notwithstanding his removal about the year 1787 to the State of Illinois, and his continued residence there as an American citizen till his death, still it is not shewn that there is any one in existence capable of deriving title through him to lands in this province. No witness produced at the trial had ever seen him. He was not proved to be living at any time within 20, 30 or 40 years; nor is it clear whether he survived his brother Henry or not. In fact nothing is said of him, but that he left Detroit, which was then in fact a British possession, about 1787, being 15 years of age, and went to the American state or territory of Illinois, from whence he never returned; and that he left children born in that state. Whether any child of John's be now living, or whether any was living five years ago, or ten or twenty, there is no evidence; nor whether he had sons or daughters or both; still less that there was at any time any one son or daughter of his, in whom the inheritance could vest.

Supposing John Hay to have been always a British subject till his death, and that he had children born to him after the year 1787 in the State of Illinois, and that some one or more of such children should be now living, yet, whether any child of his, so born in a foreign state, acquired by his birth the privileges of a British subject under certain British statutes, might depend upon circumstances necessary to be established, in order to bring him within the provisions of those statutes. And in my opinion the onus of proof would lie upon the person born in a foreign country.

Without, therefore, determining whether John Hay became at any point of time an alien to the British crown, and with an impression at present that he retained his character of a British subject, I am of opinion that, upon the evidence given at the trial, a right to inherit was shewn in Richard Hay; and if there be any child of John Hay

living, who being born in a foreign country is nevertheless capable of inheriting and holding land in this province, he or she must, under the circumstances of the case, make such right appear : and that the evidence which was given in this case was not such as should disable the children of Richard or their assigns from claiming possession of the estate in this province, which their ancestors were shewn to be in a condition to inherit, and to have a clear right to inherit, unless there may be some person who, though born abroad at an indefinite distance of time, and not shewn to be living within any certain period, may, under some statutory provision, be in a situation to claim the rights of a natural born subject of Great Britain notwithstanding his foreign birth. There is not in this case any question except as to the sufficiency of the title shewn by the plaintiffs to entitle them *prima facie* to recover ; and in my opinion the verdict given in their favour was sustained by the evidence, and must be allowed to stand.

It is the same thing to the defendant whether the heirs or their vendees recover against him ; and there is no room, therefore, for any considerations of apparent hardship in his being obliged to give up a possession to which he shews no right, to persons who seem to have given a most inadequate consideration for the purchase of so valuable a property. Park and Hunt seem to have acquired for 150*l.* the interest of those who call themselves the heirs of Henry Hay to lands probably worth 3 or 4000*l.* It is no concern, however, of this defendant, who for all that appears may be a mere trespasser claiming under no one, if they have made a good bargain through the ignorance or carelessness of the owner. There is, therefore, no reason, so far as this defendant is concerned, why any disinclination should be felt in giving to the title of Park and Hunt its fair legal effect. It is well the lands should have an owner, and not be left to be the prey of mere trespassers. If the heirs of Richard Hay took whatever was represented to them upon trust, and were too idle or indifferent to enquire, they have only themselves to blame. If they were in any manner deceived, we must presume they would have a remedy ; but that is a matter between them and their vendee.

Our judgment in this case decides that against Rowe and others, and in both the rules for new trial are discharged.

The defendants in both these cases stand before us in the same light, as persons shewing no interest or claim to possession, and therefore liable to be dispossessed by any one who has proved a good *prima facie* title.

The other two cases, at the suit of the same plaintiffs claiming under the same title, against James Walker and Solomon Walker, defendants, differ only from the former two as regards the evidence which they gave on their defence.

The defendants are sons of Henry Walker, and they endeavoured to make out that they had acquired a title under the Statute of Limitations, their father having entered about 1815, claiming the fee under a deed which he took from one Bloomfield, but of whose right to convey the land no account whatever was given. It was left to the jury, upon the evidence given, whether there had been, on the part of their father and themselves, such an unbroken possession of the different portions of land for which they severally defended as they endeavoured to establish, and the jury found that there had been such possession uninterrupted for more than thirty years. There was certainly proof to that effect, though I cannot say that I do not think the evidence was stronger to the contrary. Yet, as the evidence was conflicting, and it was fairly left to the jury, we should not be inclined, I think, to interpose by granting a new trial, looking at the circumstances of the case, but would probably have left the plaintiffs to bring another action if they chose to do so.

But the plaintiffs seem clearly entitled to the benefit of the exception in the 17th clause of our statute 4 Will. IV., ch. 4, there being no evidence that the patentee or any one claiming under him had knowledge of the land being occupied, and it being clear that the land, up to the time of its being trespassed upon, never had been resided upon or cultivated by any one claiming under the patent. We see no ground under the statute for holding, that under those circumstances the right owner will be bound by a thirty years' occupation, any more than by twenty. What

would be the case after the lapse of forty years need not be considered in this case.

It is to be considered, independently of this exception in the 17th clause, that the statute would not continue to run against the owner of the land while he resided abroad. Where Richard Hay was when Henry Hay died is not shewn, nor how long he remained in Lower Canada before he came to Upper Canada, where it seems he died. I apprehend the onus of proving the exception, by reason of which the lapse of time shall not bar, lies upon the claimant; and that therefore we must, for all that appears on the evidence, perhaps have held the statute to apply, if it were not for the exception. However, that is not material to be considered; and for the reasons we have given, the rules in these two cases are made absolute.

Per Cur.—Rules absolute.

GASCO V. MARSHALL ET AL.

What are fixtures, as between the vendee of land let into possession under a contract to purchase—and the owner of the soil—right to bring trespass for the removal of fixtures.

A building put up by a vendee of land in possession under a contract to purchase, which is found by a jury to rest upon a foundation in some parts let into the soil and connected to the foundation by mortar, is a fixture; and being a fixture, it belongs to the owner of the soil, and when wrongfully severed it becomes a chattel; and the defendants, who had at first removed it from the land into the highway, and afterwards took it away, committed a trespass in taking the plaintiff's (the owner of the soil) goods.

Trespass for taking away a frame building belonging to the plaintiff, and converting it to the defendants' use—laying the trespass on the 15th March, 1849.

Second count, laying the trespass on the 16th of March.

Pleas, Not guilty.

Second, That the goods and chattels did not belong to the plaintiff.

The plaintiff had sold to Wickes, one of the defendants against whom the verdict was rendered, a piece of land, for which he was to give Wickes a title on his completing certain payments. Wickes went into possession in December 1846, and put up a frame building—the one in question. He first set it up on cedar posts, and in the following year built up a stone foundation under it, from the surface of the ground to the sill of the house. Some of the cedar

posts were built into this foundation wall, which was united to the sill with mortar.

The ground on which the stone foundation was laid being uneven, it was raised up in some places, and in others the stone-work was let into the sill, so as to make an even line at the bottom. Against one end of the building, a root house was partly constructed, the walls of which were sunk a foot and a half below the ground, and they were built up as closely as possible against the frame.

The defendant Wickes not being able to pay the first instalment, he got a number of people together and removed the building off the premises into the highway; and some days afterwards the same party, or some of them with others, came and drew it away. It was sworn that in removing the building the foundation was injured, and also the wall of the root-house where it joined the main building. One of the witnesses swore that the wall and mortar were disturbed by the removal, and that some of the mortar adhered to the sills.

The plaintiff was present when they began to remove the building, and forbade them. The workman who built the foundation was examined on the trial, and swore that it could not be removed without disturbing the wall, for that he had built the wall up against the sill with mortar, as tightly as he could.

The defendants' counsel moved for a nonsuit, contending that either the building was a fixture—in which case trespass could not lie for taking it as a chattel—or that if it was not a fixture, but a chattel, then the defendant Wickes and the others with his authority, had a right to remove it, it having been constructed wholly at Wickes's expense.

The learned judge told the jury that a building merely resting on blocks, or supported in any manner so as not to be let into or connected with the soil, could legally be removed by any party who had erected it during his occupation of the land. Whether the building in question could be said to be merely resting on the soil, and not in any manner let into or attached to it, was left to them to say, upon the evidence; and they were told that if they found

the building to be in fact a fixture, then it was the plaintiff's property, and when it was wrongfully severed from the freehold it became a chattel, and his chattel; and the defendants coming afterwards and taking it away, would be liable to this action as for taking the plaintiff's goods.

Verdict for the plaintiff, and 25*l.* damages against eight of the defendants, and acquitting the others.

Sherwood, Q. C., obtained a rule for a nonsuit, on the leave reserved at the trial, on the ground that the verdict was contrary to law and evidence, and for misdirection. He cited *Woodfall, L. & T.* 434; 2 *Ea. R.* 88; 1 *B & Ad.* 161; 6 *T. R.* 377; 1 *H. Bl.* 258; 3 *Atk.* 13; 8 *Q. B. R.* 916.

Richards shewed cause. He cited 2 *Smith's L. C.* 114; 5 *U. C. R.* 42; 1 *H. Bl.* 260; 2 *B. & C.* 56.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the direction given to the jury was proper, and that their verdict is supported by the evidence.

The case of *Wansbrough et al. v. Merton (a)* is perhaps the strongest in favour of what the defendant contends for—namely, that the building in question was a mere chattel, and not part of the freehold; but though the language of the judges in that case seems to go rather beyond the previous authorities, it does not go quite so far as to support what this defendant insists upon.

This building did not merely rest upon a foundation which was in some parts let into the soil, but it was connected to that foundation by mortar; and was connected with the stone walls of another structure, which was sunk into the ground, and which, as well as the foundation of the house itself, was injured, as the witnesses swore, by the removal.

Upon a proper explanation of the law to the jury, they expressly found this building to be a fixture, according to the legal principles stated to them, and which were not questioned; and their verdict does not appear to us to be inconsistent with the facts proved.

There is no question here of what a tenant might or

(a) 4 *Ad. & Ell.* 889.

might not do under his privilege of removing what the law in a general sense would deem fixtures; for the defendant Wickes was a vendee, not a tenant. The point to be decided is simply, whether the building as it stood was a chattel or a fixture, in the general sense of the term.

If the plaintiff had put up this building before he sold to the defendant Wickes, the latter would have been surprised to find him denying that it passed with the land, and claiming to remove it as a chattel; or he would have been surprised, I have no doubt, if he had himself continued in possession of the land, and the sheriff, coming with a *fi. fa.* against his goods, had seized it as subject to the execution; but unless for both these purposes it could be treated as a chattel, these defendants could clearly have no right to take it away.

Being a fixture, as we think it was, it belonged to the owner of the soil; and when wrongfully severed, it became a chattel; and the defendants, who came some days afterwards and took it away from the highway, where it had been left after its first removal, committed a trespass in taking the plaintiff's goods. The circumstance of the plaintiff having afterwards taken from Wickes a relinquishment in writing of all his claim to the land, could in no way affect his right to recover upon these pleadings for the trespass complained of.

Rule discharged.

DOE DEM. BURNHAM V. SIMMONS.

Land not bound for the purpose of sale by a judgment under 5 Geo. II., ch. 7—Necessity of proving delivery of fi. fa. against lands to sheriff—Consequence of omitting to prove this.

Land not being bound by a judgment for the purpose of sale, under the 5th Geo. II., ch. 7, but only by the delivery of the *fi. fa.* against lands to the sheriff, the time of such delivery should be proved by the purchaser under the sheriff's deed; and where this proof had been omitted, and a verdict had been given for the plaintiff, with leave to the defendant to move for a nonsuit, the Court declined nonsuiting the plaintiff, but gave him a new trial on payment of costs.

Ejectment. Verdict for the plaintiff.

The defendant made title under a sheriff's deed. On the 15th of December, 1836, a judgment had been entered in the suit of the Commercial Bank v. William Robertson, for 20*5*l. 9 6*s.*d.

On the 16th December, 1837, a *fi. fa.* against goods issued; and on the return of *nulla bona*, a *fi. fa.* issued against lands 21st February, 1838, returnable on the last day of Easter Term, 1839.

On the 27th November, 1839, the sheriff made a deed of the premises to the lessor of the plaintiff, as being the highest bidder at a sale under the *fi. fa.*, made on the 15th of October, 1839.

Neither the sheriff's deed nor the judgment roll contained any information of the time of the delivery of the *fi. fa.* against lands to the sheriff.

It was proved on the trial, that by deed made the 4th of August, 1838, William Robertson conveyed this land to the defendant Simmons; and consequently, to enable the lessor of the plaintiff to shew a better title under the sheriff's deed, it was necessary for him to establish that although Robertson, the defendant on the *fi. fa.* had alienated the land before the sheriff conveyed it to the plaintiff, yet that the execution in the sheriff's hands had attached upon the land before the deed was made by Robertson to the defendant. The onus lay upon him, and no proof was given. Upon this ground, leave was reserved to move in term to nonsuit the plaintiff; and a rule being obtained, *the Court* said—

The utmost we can do is to forbear to nonsuit the plaintiff, which would expose him to the necessity of bringing a new action, and to set aside the verdict which he has obtained, and grant him a new trial on payment of costs.

That lands were not bound by a judgment for the purpose of sale under 5 Geo. II. chapter 7, but were only bound before our late Registry Act by the delivery of the *fi. fa.* to the sheriff, was decided in this province in several cases at an early period.

Henceforward the same question will not arise, lands being now bound upon the registry of the judgment, and not before.

Per Cur.—New trial, on payment of costs.

BRYSON ET AL. V. CLANDINAN.

Interpleader Act—Nonsuit—Usury as connected with the lumbering trade—Difference as regards the effect of usury, between the lending of money to the lumberer, taking the timber as security only for advances, and taking it absolutely.

A plaintiff may be nonsuited on the trial of a feigned issue under the Interpleader Act.

An agreement, that A. B. shall allow C. D. (lumberers upon the Ottawa), in addition to legal interest, "the further sum of four per cent. upon all monies so advanced," for the purpose of getting out timber—is usurious and void.

If A. and B., instead of being mortgagees, holding the timber merely as security for monies advanced under such an usurious agreement, had taken the timber absolutely in payment of their account for advances, then, although their account might have included usurious interest, the property, after it had so become theirs, could not have been divested on that ground.

An issue was directed under the Interpleader Act, to try whether certain timber, seized by the sheriff of the District of Bathurst under a *fi. fa.*, at the suit of Samuel Clandinan the elder v. George Clandinan and Charles Clandinan, and under a *fi. fa.* against the same defendants at the suit of William Waver and others, were on the 12th of February, 1849, the property of the plaintiffs, Alex. Bryson, James Ferrier, junior, George Davies Ferrier and Peter Redpath, or any or either of them.

The facts proved were, that in 1846, Brook entered into a verbal agreement with George and Charles Clandinan to supply them with provisions and other necessities, in order to get out a quantity of timber and take it to Quebec market; and he agreed to take from them there all the timber they should make with the assistance of these advances. Some short time afterwards Brook took Gray into partnership, and they two entered into a written contract with the same two Clandinans, of the same nature as the one which had been before made verbally. In this written agreement, which was executed on the 8th April, 1847, and which Brook swore upon the trial was intended to carry into effect their previous verbal understanding, it was expressly provided, "that all the timber then made or to be made, got out and conveyed to the Quebec market, shall be marked B. G. in addition to the mark of Clandinan & Co., *and shall be the property and now is so* of Brook and Gray, to be held as security for the supplies now already advanced or to be advanced on said timber, and as such shall be sold by

Brook and Gray at Quebec," who, after deducting their advances and all the charges, were to pay the surplus to George and Charles Clandinan.

In this same written agreement it was provided, that the Clandinans should allow Brook and Gray ten shillings above the market price on every barrel of pork, five shillings on each barrel of flour, and five pence on every bushel of oats, and six per cent. on all monies advanced to get out the timber, "*and the further sum of four per cent. commission on all monies so advanced.*"

On the 15th April, 1847, Brook and Gray assigned this timber to Redpath, one of the plaintiffs, as trustee for their creditors. The timber for want of water could not be floated down the river Mississippi into the Ottawa in 1847, nor it seems in 1848; and Redpath, after it got aground in the Mississippi, where Brook and Gray had it secured, refused to make advances for the purpose of getting it to market.

One of the defendants on this record, Samuel Clandinan, is the father of George and Charles Clandinan. On the 19th of March, 1847, he took a written assignment from his sons *of all their white pine timber made up to that date* and 150 pieces of elm, in consideration of advances alleged in the instrument to have been made by him to them to the amount of 98*l.* 11*s.* 9*d.*.

This agreement provided that he was to hold the timber until he should be paid the said sum, and he covenanted that on being paid that sum he would give up all his interest.

Samuel Clandinan had taken also a confession of judgment for his alleged debt; he never took possession of the timber, but while it was still lying in the Mississippi, where Brook and Gray had secured it, he had it seized under an execution issued at his suit. A number of other executions against George and Charles Clandinan were in the sheriff's hands; and the question to be tried upon a feigned issue was, whether the timber so seized was or was not the property of Redpath, or any other of the plaintiffs.

On the plaintiffs' side it was contended, that Samuel Clandinan never having taken possession of the timber,

under the assignment made to him, and having afterwards caused the timber to be seized, as being still the property of his sons, notwithstanding the alleged assignment, should be held conclusive against his claiming under that assignment.

On the defendants' side an objection was taken, that the transaction between Brook and Gray and the two Clandinans was usurious on the face of it, it being stipulated that they were not only to have interest on all their advances, but a large price above the market price on all provisions furnished, and also four per cent. commission on all monies advanced.

The learned judge reserved leave for the defendants to move for a nonsuit on the objection of usury, as there was no doubt respecting the fact in that respect; and he submitted to the jury the question of fact upon the *bona fides* of the assignment made to the father, Samuel Clandinan. The jury found for the plaintiff.

Phillpotts obtained a rule for a new trial on the law and evidence, and for misdirection, or for a non-suit. He cited *Smith on Contracts*, 153; 1 *Camp.* 418; 3 *B. & C.* 272; 1 *Wils.* 286; 12 *M. & W.* 490; 1 *Saund.* 294, note; 4 *M. & S.* 162; 2 *A. & E.* 12.

Richards, shewed cause. He cited—7 *M. & W.* 183; 1 *Cr. M. & R.* 711; 8 *T. R.* 575; 3 *T. R.* 266, *Dunning v. Jordan*; 4 *U. C. R.* 400; 5 *T. R.* 711; 3 *T. R.* 406.

ROBINSON, C. J., delivered the judgment of the court.

I assume that a plaintiff may be nonsuited on the trial of a feigned issue of this description, as well as upon other trials. Then, first, as to the usury. We have no doubt that the stipulating for a commission of four per cent. on monies advanced, in addition to legal interest, was usurious. We have abundant reason to know that such arrangements are not unusual in carrying on the lumber business; and it has been attempted to uphold them on the ground of the very great uncertainty and risk attending advances made for the purpose of getting out timber, where the lender has to depend, as he generally must, on the prudence and honesty of the persons whom he thus agrees to assist, on

the proceeds being insufficient to pay all expenses. But we have no authority to hold that this branch of business is exempt from the usury laws more than others. The principal money lent in such transactions is not by the nature of the contract in hazard, but only from the nature of the business. The borrower is liable to pay at all events, and would be made to pay if he were solvent, whatever might be the issue of his adventure as a lumberer, and the statute, therefore, which limits the rate of interest to 6 per cent. applies in his case as well as in others. Under such circumstances, a small commission has been allowed, in certain descriptions of business and upon the footing of usage, where there is something to be done which gives a claim to remuneration; but here 4 per cent. is charged as a mere bonus for lending the money. We look upon that as a charge which clearly cannot be upheld, and the contract between Brook & Gray and the two Clandinans being illegal on account of it, we have only to consider whether that contract was necessary to be given in evidence in order to support the plaintiffs' case.

The circumstances of this case, independently of the question of usury, are much like those in the case of *Dunning v. Gordon*, in this court (4 U. C. R. 300), and according to what we then held, I consider that the property had rested in Brooks & Gray, in consequence of what followed the agreement. The timber was marked for them—they had taken possession of it, and had secured it in the Mississippi river. The jury found that the assignment to Samuel Clandinan, made a few days before that to Brooks & Gray, was not made *bona fide*, and should not therefore be upheld; that is therefore to be laid aside, and the question is wholly as to the right of Brooks & Gray, or which is the same thing, their assignees, to intervene. That calls upon them to prove their title. There is no doubt that they were in possession, I think; but we must determine the right of property.

Then the nature of their interest upon their own shewing is this: they had a right to hold the timber in security till they could take it to Quebec and sell it for and on account

of the Clandinans, when they were to pay over to them whatever it might produce above the charges and the debt due to them under their contract, for advances made upon the terms of the contract. They are mortgagees under an invalid mortgage, and their security being void under stat. 51, Geo. III. ch. 9, sec. 6, they cannot keep their hold of the property.

If they had taken the timber absolutely in payment of their account for advances, then, although their account might have included a usurious interest, the property after it had so become theirs, could not have been divested on that ground; but here all is still going on under the contract, the transaction is not closed, the timber is in effect the property of the Clandinans, subject only to a claim upon it under an assurance which we must pronounce void.—3 T. R. 406; 1 Ea. R. 58; 5 T. R. 711.

Per Cur.—Rule absolute for nonsuit.

DOE DEM. BARKER ET AL. V. CROSBY.

Ejectment—when a party having the right of possession, is entitled to succeed in, against a party who has the legal title.

A. B. is let into possession of land by C. D., upon an agreement to purchase, with the understanding that he is to remain in possession until he makes default in the payment of his instalments. A. B. afterwards, without making any default, lets C. D. into possession, upon an express condition however, that he (C. D.) is to restore to him (A. B.) the possession, if a certain state of things should occur. The event upon which A. B. is to regain possession under this agreement, happens—C. D., nevertheless, retains the possession, and A. B. brings his ejectment; and *Held per Cur.*—that under these facts, A. B. being entitled to the possession, could maintain his ejectment against C. D., though he had the legal title.

Ejectment for lands in Markham.

The defendant Crosby being owner of the fee on the 10th of May, 1847, made his bond to James J. Hunter and Robert Hunter, two of the lessors of the plaintiff, reciting that he had agreed to sell the land in question to them for 262*l.* 10*s.*, of which 100*l.* was to be paid on 1st January, 1849, 50*l.* one year thereafter, 50*l.* at the end of two years, and 62*l.* 10*s.* at the end of three years, with interest; and binding himself to give them a title when all the payments

should be completed. It was stated in the condition of the bond, that the obligors were to have possession until default should be made in paying any of the instalments.

On the same day James J. Hunter and Robert Hunter gave their notes to Crosby for their several instalments, payable to him or bearer.

On the 6th April, 1848, James and Robert Hunter assigned to Nelson Read their bond, and all their interest under it, in the land to be conveyed; and Read agreed to pay to Crosby the 262*l.* 10*s.*, which they were to have paid, or any part of that sum which had not yet been paid; and also an additional sum to James and Robert Hunter, of 187*l.* 10*s.*, which was acknowledged to have been paid by them to Crosby, in hand.

Afterwards Read, in writing, by indorsement on this latter instrument (but not under seal), assigned all his right and interest under the agreement to Robert Hunter, for 225*l.*

And on the 8th November, 1848, Robert Hunter, by his attorney James Hunter, executed an assignment not under seal, of all his interest under the agreement, to Archibald Barker, William Morgan, and Alexander Hunter, trustees for the creditors of Nelson Read.

On the 20th October, 1848, Robert Hunter had executed a power of attorney under seal to James Hunter, under which the last mentioned assignment was made. This authorized James Hunter (who is the father of Robert, James J. Hunter being his brother), to demand and recover all Robert Hunter's rights and claims to the property claimed by Nelson Reed, and assigned to him by Robert Hunter *by certain instruments dated 13th September last*, by which appears to be meant the assignment indorsed on the deed, assigning to Reed the original bond of the defendant Crosby, though that bears in fact no date. And it was added in this power of attorney, that in case James Hunter should think it advisable to recognize the subsequent assignment (namely, that of the 8th November, 1848,) made to Barker, Morgan and Alexander Hunter, *or to any other person whomsoever*, and to submit his claim to an

equal participation in the proceeds of the property so claimed by Reed with his other trustees, according to the amount of their respective claims, then he authorized his attorney James Hunter to do so.

On the 11th October, 1848, Nelson Reed had executed an assignment to Barker Morgan and Alexander Hunter, of all his real and personal property, for the benefit of his creditors. This deed was executed by Robert Hunter and James J. Hunter, as creditors, through their attorney James Hunter, senior.

One McKenna was examined as a witness on the trial, and swore that on the 21st September, 1848, James and Robert Hunter, the purchasers from Crosby, came to him with Crosby, and that they all desired him to be witness that they, the Hunters, had relinquished the purchase from Crosby, who was to pay back 100*l.* which he had received, and to return the notes which he had taken from them for the residue of purchase money, and to pay them also 37*l.* 10*s.*, and they gave Crosby then the key of the house which was unoccupied, and told him he was now put in possession. This was a mere verbal arrangement. It was not explained to the witness what the object of it was, and he did not know whether Crosby had or had not done any thing towards executing his part of the agreement. The Hunters told him that Crosby's bond to them was in the hands of their attorney, but that they would get it back and deliver it up to him, and execute any re-assignment if he wished it. Afterwards, early in November, and before Robert Hunter, by his attorney James Hunter, assigned to the trustees; but after the assignment made by Reed to those same trustees for the benefit of his creditors, James Hunter, the father, went with the trustees to the defendant Crosby, when the same witness McKenna was present, and demanded possession of the premises—that the defendant refused to give up possession.

This was the substance of McKenna's evidence.

On the other hand, James Hunter, the father, gave evidence on the trial, that in October, 1848, Reed having failed, and Robert and James Hunter fearing he would never pay

them, agreed with Reed to take back the property, and that Robert Hunter went into possession; that his two sons thereupon agreed with Crosby to let him have the property if he would repay the 10*l.*, give up the notes, and pay 37*l.* 10*s.*; but that this arrangement was only provisional, depending upon the result of an arbitration which was going on between Barker, as an attaching creditor of Reed and Reed, and that if Barker's claim on that occasion should be upheld by the decision of the arbitrators, so that he should be allowed to hold under the attachment some property which had been seized, then the agreement between Reed and the Hunters for relinquishing the property to the Hunters, was to be at an end; and in that case Reed or his trustees were to retain the property. And this witness swore that when Crosby yet possessed the property, before the execution of the trust deed by Reed, it was upon the clear and express understanding, that if the agreement between Reed and the two Hunters, from whom he had originally purchased, for re-assigning or relinquishing the property to them should not go into effect, he was then to quit the possession; and in that case, the agreement between the two Hunters and Crosby for resigning their purchase back to him, could not be carried out. He swore further, that Crosby's possession was given to him on the further condition, that he was to pay at once the 37*l.* 10*s.* to the Hunters, and give up the notes; that he afterwards refused to do this, and insisted on keeping possession contrary to the understanding on which he had received it, and would give no reason for refusing to do what he had engaged to do. This witness declared positively that Crosby was only let into possession to hold and take care of the premises till the arrangement should be completed, and that if it fell through he was to give up possession.

The jury were directed that it was plain the legal title to the land was in the defendant; but that this, like other actions of ejectment, was a contest about the right of possession, which may, in any case under particular circumstance, be in another than the owner of the fee, as was clearly the case under the bond first given by Crosby to the

Hunters, which gave to them the right to enter and enjoy as purchasers before they got their title, and until they should make default in payment. The jury were then told that if they believed the evidence of McKenna, and that Crosby had received the possession which he now held in consequence of the Hunters having relinquished their purchase, then there was no reason why he should be dispossessed by this action, for he had the legal title, and there would in that case be no reason why he should not also have the possession; but that if the evidence of James Hunter, the elder, was correct, then the verdict should be against the defendant; for according to that evidence, the defendant had been let into possession by the Hunters, who had made no default in their payments to him, upon the express understanding that he was to hold it only conditionally, depending on the event of other arrangements, according to which the two Hunters might or might not be in a condition to relinquish their original purchase to him, Crosby; and that matters had so turned out, that according to the understanding he was bound, acting in good faith, to quit the possession which he had received only for a certain purpose.

The jury gave credit to the latter account of the transaction, and gave a verdict for the plaintiff.

Eccles, obtained a rule for a new trial on the law and evidence, or for misdirection, or that the verdict be entered for the defendant on the first count.

Burns shewed cause.

The cases cited were—2 A. & E. 11; 9 C. & P. 254; 8 Jurist, 964; 2 Stra. 1180; 1 Wils. 1.

ROBINSON, C. J., delivered the judgment of the court.

We see no ground for setting aside the verdict. That Crosby has the legal title to the land is not disputed, but is admitted on all hands. When he contracted to sell the land, however, to the two Hunters, he expressly required in his contract that they should enter and hold possession as purchasers, unless and until they should make default in paying any of their instalments. That is the common course of such transactions, and the reasonable footing for

the parties to be upon, because the purchaser agrees to pay interest on the purchase money, and should of course have possession of the property so long as he fulfils his agreement. Then, if the Hunters had up to this time kept possession of the property, Crosby could not have turned them out in violation of his own agreement, although he still retains the legal title ; for it is not pretended that the Hunters, when the action was brought, had failed in making any payment. That they are not in possession, but are obliged to become plaintiffs in ejectment, is only owing to the circumstances (according to their father's account, to which the jury gave credit,) that they had let Crosby into possession, but upon a clear understanding that if a certain state of things should occur, he was to restore the possession to them, and they should continue to enjoy as purchasers under their bargain with him, agreeably to the original intention. That being so, Crosby, though he is the owner in a strict legal sense, cannot insist on retaining the possession contrary to his express agreement, and put them to proof of title—he must first restore the possession which he received only on certain conditions, and then if he has any legal pretence for dispossessing them, he must become plaintiff in an action for that purpose.

A verdict should be entered for the plaintiff on the demise of James J. and Robert Hunter, on the sole ground, independently of all questions of title, that the defendant had gone in under them, and was bound to act up to his agreement in relinquishing possession.

Per Cur.—Rule discharged.

MOORE V. HOLDITCH & HENDERSON.

Evidence of tender of amends by Magistrate under general issue.

Where a magistrate is sued in trespass for an alleged illegal proceeding under the 4 & 5 Vic., ch. 26, he may give in evidence a tender of amends, under the plea of the general issue.

Trespass—false imprisonment.

Plea—"Not guilty," by statute.

The defendants were magistrates, and upon a complaint that this plaintiff had driven his horse against the horse of one Willoughby, and killed him, they issued their warrant directing that Moore should pay a certain fine in three months, or be imprisoned four months.

No attempt was made upon the trial of this cause to support the warrant by proof of a legal conviction, but it was plain upon the evidence that the defendants had merely mistaken their authority, not intending to do any thing oppressive or illegal. The plaintiff left them, in fact, expressing his obligations to them for giving him so long a period to pay the fine.

Afterwards, and within the three months, he seems to have taken advice, and discovered that the warrant was illegal, and then refused to pay any thing, and allowed himself to be taken to gaol, where he was detained about a week.

As soon as the defendants were made aware of their error, one of them tendered 5*l.* as amends, and offered further to submit the matter to the arbitration of any respectable neighbour, expressing regret at the inconvenience the plaintiff had suffered ; the plaintiff, however, rejected all overtures of this kind, and brought his action.

It was left by the learned judge to the jury to determine whether the plaintiff had a claim to greater damages than had been tendered, and they gave it as their opinion that he had not, and on that ground found their verdict for the defendants.

A rule was obtained for a new trial, on the ground that the defence of tender of amends was not open to the defendants upon the general issue, and also upon an allegation of an improper interference by the sheriff, at the time of the trial, with the clerk of assize, in his duty of empanelling the jury—moved without costs or with costs to be paid by the sheriff, on whom a copy of the rule nisi had been served.

ROBINSON, C. J., delivered the judgment of the court.

It is not a question now, whether the jury judged rightly or not in holding that sufficient amends had been tendered

for an involuntary injury when the 5*l.* was offered to the plaintiff; that was a matter for them to determine; and looking at all the circumstances, we should certainly not be disposed to doubt the propriety of the decision.

The justices erroneously imagined that the complaint which had been made to them proved a case under the 4th and 5th Vic., chap. 26, respecting malicious injuries to property, and it was under that statute that we must suppose they were proceeding. They were entitled, therefore, to avail themselves of the protection which the statute gives them, wherever they have unintentionally erred in acting upon its provisions. Among these is the very just and salutary provision which gives them a right to a month's notice of action, and the privilege of tendering within that month what they may consider sufficient amends to the aggrieved party. They must tender at their peril sufficient amends, or their tender will be of no use to them; and if they do tender what is sufficient, the other party refuses it at his peril, for if he does refuse it and proceeds with his action notwithstanding, and if the jury who afterwards tries the cause shall find that the sum offered was reasonable, then he will gain no advantage by the suit.

It is a wholesome check upon the bringing unreasonable and vexatious actions on account of errors in judgment or mere slips in proceeding, which even the best instructed and most careful are liable to commit, and which should never be rigorously visited unless there is reason to impute an oppressive or corrupt intention.

But it is objected that the defendants in this case could not take advantage of their tender, because they had not specially pleaded it, but had only pleaded the general issue by statute, and the plaintiff refers to the English statute 24 Geo. 2, ch. 44, sec. 2, to sustain this objection.

There is no doubt that that act does expressly require that the tender, where it has been made, shall be specially pleaded, together with the general issue, but the statute of this province which is in question, 4 & 5 Vic., ch. 26, differs in this respect: in the same clause in which it gives the privilege of making the tender, which if it be sufficient in

amount shall have the effect of entitling the defendant to a verdict, it provides that in any such action the defendant may plead the general issue, and give *the special* matter in evidence at the trial, and that the plaintiff shall recover in any such action, (that is, in any such action in which the general issue alone is pleaded) if a tender of sufficient amends shall have been made before action brought.

This quite clearly admits of the evidence of tender being given under the general issue, and we have already so decided, in accordance with English decisions made upon a statute precisely similar in this respect. The Court of Exchequer in *Richards vs. Easto*, 15 M. & W. 252, said : "The defendant may plead the general issue, and give the act and the special matter in evidence at any trial to be had thereupon." The special matter which the defendant is permitted to give in evidence is *all that the statute makes a defence*.

With regard to the application for a new trial on the grounds stated in the affidavits—it rests entirely on a surmise injurious to a public officer, of which there is no proof, and which we think is satisfactorily repelled by the affidavits filed in answer. If the plaintiff really believed, at the time of the jury being empanelled, that he saw the sheriff interfering with the jury tickets in a manner from which he inferred a corrupt design to pack a jury to his prejudice, he should have complained at the moment, and not been silent, and taken the chance of a verdict in his favor, reserving a right to move afterwards, if the other party should succeed. His reason given for not noticing it is that he could not communicate with his counsel, which is on the face of it absurd. Upon mere suspicion the plaintiff has taken upon himself to impute most dishonorable conduct to the sheriff, who has been called upon to answer the charge ; and as the plaintiff made it part of his rule that the sheriff should pay the costs of his application, justice requires that when the ground is not supported the rule should be discharged with costs to be paid to the sheriff if he has sustained any.

Per Cur.—Rule discharged.

ADAMS V. ACKLAND.

Judge of County Court—Barrister—their privilege from arrest.

The Judge of a *County Court* cannot be arrested upon *mesne* or *final* process.
A barrister cannot be arrested on *mesne* process.

In Trinity term last, a rule nisi was obtained by *Hector* from the Practice Court returnable in full court, calling upon the plaintiff to shew cause why the arrest of the defendant upon the writ of alias *ca. sa.* issued in this cause, and all subsequent proceedings therein should not be set aside, on the ground of the defendant being privileged from arrest as a judge of the Huron District Court, and because he was arrested twice on a *ca. sa.* in the same cause.

The defendant was arrested on the 20th of March, 1849, on an alias *ca. sa.* in this cause, issued from the office of the deputy clerk of the crown of the district of London, directed to the sheriff of the district of Huron.

It appeared that on the 21st of July, 1849, another *ca. sa.* in the same cause, on the face of it an *alias*, not a *pluries*, issued against the defendant, on which he was arrested on the 28th of July.

The defendant filed an affidavit, stating that at the time of his arrest he was, and still is, Judge of the Huron District Court, and of the division courts therein, under a commission under the great seal, dated the 6th of December, 1841, and chairman of the Quarter Sessions of the Huron District, and that he would be unable properly to discharge the various duties of his said judicial offices if the said arrest remained in force.

Mr. Hector cited in support of his rule, 2 Str. 1209; 6 T. R. 217; 1 H. Bl. 636; 3 Dougl. 45; Viner's Abr. Privilege; Tidd, 213.

Muttlebury shewed cause: he cited 2 M. & P. 279; 1 Cr. & M. & R. 525.

ROBINSON, C. J., delivered the judgment of the court.

Upon the ground that this defendant's arrest was irregular, because he had before been arrested for the same cause, the rule has not been sustained: there is nothing before us on the affidavits to enable us to act upon that objection.

Neither the fact of his discharge from the alleged previous

arrest, nor the grounds of such discharge, have been stated to us, and it would be necessary we should know the particulars of the alleged discharge before we could hold the second arrest to be vexatious and irregular.

Upon the general ground, the question is an important and interesting one. Being left to decide it upon reason and principle, we have come to the conclusion that the defendant should be discharged from custody under the writ, and the rule is made absolute merely to that extent.

It is true that the court of which he is judge is a court of inferior jurisdiction ; but it is a court of record, having extensive jurisdiction ; and we know also that the judge who presides in it is a judge in bankruptcy, with large powers, requiring to be exercised at the time at least of this arrest being made. He is not like a justice of the peace, who is merely a member of a court in which many others are competent to act, but he presides alone ; and although it is true that the law allows to debtors in execution the privilege of limits co-extensive with the district, yet we cannot in determining the question rest anything upon that, because we cannot assume that the defendant could do what is requisite for entitling himself to the limits, and, besides, while he is so placed, he is, in the eye of the law, in custody, and so in a situation quite incompatible with his exercising independently his functions as the presiding and only judge of a court.

As a barrister, which he is and must be by law, he is exempt from arrest on mesne process—being a judge we think the public interests require that the protection should be carried further ; for the same reasons which do undoubtedly give to the judges of the superior courts privilege from personal arrest, apply to him as a judge. His imprisonment would occasion a failure of justice ; persons coming to his court or returning from it, would be privileged from arrest in order that the course of justice may not be impeded ; and it would be very inconsistent that it should be in the power of any individual to close the court itself by requiring the imprisonment of the judge, in order to obtain security for a trifling debt.

The inconvenience which the public would sustain is so much beyond any advantage which the individual could derive from the process, that we must assume it to be against the policy of the law that the judge of the district court should be allowed to be detained in custody upon a civil process of this kind.

If a barrister has privilege while on the circuit, and going to and returning from the courts, it seems clear that we must extend the same privilege to a barrister who is also a judge, and who is liable to be called upon not merely to preside in a court at certain stated times, but any hour of every day, except Sunday, to act in a judicial capacity, in some matter in which he alone is competent to act in. 1 H. Bl. 636; 2 Dowl. 51; Cr. & M. 579; 3 N. & M. 212.

Per Cur.—Rule absolute.

AUBREY QUI TAM V. SMITH.

Buying a pretended title—Statute 32 Henry VIII., 9—Verbal bargaining for title—Admission of the existence of deed by party buying, in itself insufficient.

A mere *verbal* bargain for the sale of land will not subject a person to the penalty of the statute 32 Henry VIII., chap. 9, for buying a pretended title.

A person cannot be convicted under this statute merely upon his own admission that he has taken a deed from a party out of possession; some evidence *aliunde* must be adduced of the existence of such a deed.

Debt *qui tam* on the statute 32 Henry VIII., chap. 9, for buying a pretended title.

The declaration contained three counts: In the first it was charged that Fields and his wife bargained and sold to the defendant their pretended right; that the defendant *took of them their* pretended right to the said lands, *so bargained and sold to him*; and that the defendant at the time of *buying and taking such* pretended right well knew, &c.

In the second count it was averred that the defendant, by means of a *certain indenture* of bargain and sale *made and executed* by Fields and his wife to the defendant, did obtain and get the right to certain other lands, and that theirs was a pretended right; that the defendant, at the time of his *so obtaining and getting such pretended right*, well knew, &c.

In the third count it was stated that the defendant, by

means of a *certain deed in writing made and executed* by Fields and his wife to him, *did obtain and get* their right, and that the said right, at the time of the defendant's obtaining the same was a pretended right, and that the defendant, at the time of his so obtaining and getting such pretended right, well knew, &c.

Plea nil debet.

Mrs. Morten, widow of Edward Morten, it seemed, owned the land in her own right; and in 1837 her son took upon him, by what right does not appear, to convey to this plaintiff, who went about that time into possession, and enjoyed it always afterwards till he conveyed ten acres to one Stevens and the remainder to his son. They went into possession and enjoyed as he had done; and the complaint is, that while they were thus in possession holding adversely—namely, sometime in July 1848—the widow of Edward Morton, who had afterwards married Alexander Fields, made a deed of the land jointly with her husband to the defendant. There was evidence enough to warrant the jury in finding that the defendant knew at the time of his taking the deed (if he did take one) that the other persons were in possession claiming the fee adversely.

The difficulty in the case was, that it was not shewn that Fields and his wife had in fact executed any deed to the defendant, otherwise than by several witnesses swearing that they had heard the defendant say that he had taken a title from them. No deed was produced, nor was any witness called who had seen such a deed; no account therefore could be given of its contents. A notice to produce the deed had been served, but the actual existence of any such deed was not proved by any one who had seen it executed, or had read any part of it, or heard it read, or had seen such an instrument. There was no proof of the wife having been examined as to her consent to part with her property, without which the deed could have no effect. Two witnesses swore that the defendant told them he *had the title*; that he had paid seven hundred dollars for it—whether the husband had signed the deed or not was not stated; he spoke to them as if he had bought from

Mrs. Fields only. He told another witness that he had got a deed from Mr. and Mrs. Fields, and had paid seven hundred dollars for it.

The learned judge left it to the jury upon the questions, whether the right of Mrs. Fields was pretended within the statute, by reason of the seizin being in another; whether the defendant knew of this—and that neither she nor any under whom she claimed had been in possession or receiving the rents or profits; and whether Fields and his wife had made to the defendant, and the defendant had taken from them, a deed purporting to convey the land.

Cameron, Q. C., obtained a rule for a new trial on the law and evidence, and for misdirection.

Leith shewed cause.

The authorities cited were—8 Taunt. 450; 8 A. & E. 582; Co. Litt. 369 a; 2 Mod. 67; 2 Bing. N. C. 222; 1 U. C. R.

ROBINSON, C. J., delivered the judgment of the court.

The question in this case is not a technical one upon any minor point, but whether the evidence was such as warranted the learned judge in leaving it to the jury as being sufficient, if they gave credit to it, to support a verdict for the penalty.

It does not appear to us that it was sufficient. Unfortunately our books supply us with very scanty information respecting the effect which has been given to this statute against buying and selling pretended titles. It has not engaged attention in England for more than a century; and except in the leading case of *Partridge v. Strange and Croker* (a), and a page or two in Coke's Institutes and Hawkin's Criminal Law, we find little said about it.

It was passed many years before the Statute of Frauds, which requires all contracts respecting an interest in land to be in writing. But whatever might have been held before the Statute of Frauds, we should find it difficult I think, now to be told, that a mere verbal bargain for the sale of lands, which could not by possibility have any legal effect, would subject a person to the penalty of the statute. Of course, it never could be necessary that the title taken con-

(a) 7 Ea. 6, Plowden.

trary to the statute should be a valid title, for then the statute could have no effect.

In *Goodwin v. Butcher* (a) that was contended, but met with no countenance from the court. It was most unlikely that it should, for that would be establishing a principle entirely inconsistent with the intended operation of the statute. No doubt it would be no objection in a prosecution under the statute, that the person assuming to convey contrary to its provisions had no estate to convey; neither would it be an objection that the conveyance, by reason of any other matter extrinsic to the deed itself, could pass nothing: as for instance, where a lease was made off the land, which under the circumstances could not have effect because it was not sealed on the land, there the court held that nevertheless it was an offence against the statute, because in the opinion of the vulgar, the court said, such a lease would be regarded as good, and might be made the means of disturbing the person in possession.

The difference between those cases and that before us is, that in the present case all that was attempted to be proved was, that the defendant took from a married woman a conveyance of land; whether she had executed such a deed jointly with her husband did not appear, nor was there any proof that she had been examined before a judge as to her willingness to convey, without which it is expressly declared by our statute 1 William IV. the deed shall not be valid, *nor have any effect*. It is therefore a mere nullity—I mean the conveyance of a married woman—unless accompanied with the formalities required by the statute, and which are required to appear in or upon the deed itself. If by merely taking a deed from a married woman executed in such a way that an act of parliament declares it shall have no effect, a person brings himself within the penalty of the act 32 Henry VIII, chap. 6,—then it must follow, I think, that he must equally do so by making a mere verbal bargain about the purchase, though it could no more disturb the possessor than any other idle conversation.

The doubt I have is, whether that at least must not be

done, which if the person assuming to convey had no interest, would not be a mere idle insignificant act. In other words, though the statute clearly is not so limited as to apply only where a valid assurance has been executed, yet I doubt whether we must not hold that there must be a *bargaining, buying or selling*, or a covenanting, granting or promising, by some such transaction as could legally operate as a bargain, purchase or sale, or as a grant or promise, provided the parties were seised of an interest.

The next difficulty that I feel in this case is, that the only evidence we have of a bargain or purchase by this defendant is, that he told several persons that he had got a deed from Mrs. Fields. Nothing else is known of his having committed any such offence than this conversation of his. No deed has been seen by any one; no one consequently could or did give any account of its contents, and to this moment there is no proof that any deed of the kind exists or has existed. To convict upon such evidence, it seems to me, without any proof *aliunde* of the *corpus delicti*, would be dangerous and inconsistent with the course of our criminal law. The objection is not that a subscribing witness was not called to prove the deed. The plaintiff had no means perhaps of knowing who the subscribing witness was, or that there was any subscribing witness, and if he could have proved the deed to be in the possession of the defendant, and given satisfactory evidence of its contents by some one who had read it, there would be no difficulty.

The case of *Cooke v. Tanswell* (a), cited by Mr. Leith in the argument, would meet that objection; but while such a deed has not been seen by any one, and is really not known to exist otherwise than by hearsay, it seems to me the defendant ought not to be convicted in a ruinous penalty for an offence which may be merely imaginary. If the defendant had in a casual conversation said that he had forged a deed as from Mrs. Fields, he could clearly not be convicted without at least proving that such a writing had been seen by some one. We never see a man convicted of theft upon his admission that he stole the property of

(a) 8 Taunt. 450.

A. B. until a foundation has been laid by giving evidence that such property was in fact stolen. We ought to know something of the contents of the supposed deed. It may possibly be that Mrs. Fields may not in fact (if she did give any such deed) assume to convey more than such a kind of equitable interest as it has been determined may be conveyed notwithstanding the statute (a).

On the whole, though we find no express authority upon these points in any case adjudged under this statute, or in any text book, our opinion is that the evidence was too unsatisfactory to sustain a conviction for bargaining for or buying a pretended title; for we do not know that anything was in a legal sense bargained for, or bought or pretended to be bought; and we ought to proceed on perfectly clear ground when convicting a person in a penalty of 500*l.*, under a statute which I believe has not been made use of in the country in which it was passed for more than a hundred years.

If the informant in this case was unable to prove his case by any one who had seen such a deed as is complained of, he should not reasonably, I think, have felt himself to be in a situation to sue for the penalty, since no one can be disturbed by a mere rumor of a deed.

We think there should be a new trial, without costs.

Per Cur.—Rule absolute for new trial without costs.

HAWLEY V. DIXON ET. AL. EXECUTORS OF DAWSON.

Partnership inter se, &c.—what constitutes a

Held, per Cur.—that the agreement given below did not create between the parties a partnership *inter se*,—and that, consequently, the one could sue the other on such agreement at common law, without resorting to equity.

In this case the plaintiff Hawley and the testator Paul Dawson, on the 19th of March, 1842, entered into a sealed agreement, by which Hawley “agreed to rent and let to Dawson his clothing works and carding machine for ten years from 1st May, 1841,—on condition that Dawson should work and carry on the clothing works and carding machine faithfully and in a workmanlike manner during

the term—the works and all tools and machines to be kept by Dawson in good order and condition, and to be delivered up to Hawley, his heirs, &c., in as good condition and repair as when demised; and after deducting the expenses for dye-stuffs and soaps, the profits and proceeds are to be divided, or, in other words, the said works are to be carried on to the halves, and the proceeds of all work done is to be equally divided between the parties; the said Dawson is to collect all accounts, and a division is to take place within each and every year of all collections, and the said Hawley is to receive his half, or share.”

Dawson entered under this agreement, and carried on the works for some time, and died. This action was brought against his executors for not accounting for the proceeds and paying the plaintiff his share, after deducting the expenses for dye-stuffs and soaps.

The jury found in favour of the plaintiff for such sum only as the books kept by Dawson showed he was properly accountable for, under the agreement; but it was objected that the plaintiff and Dawson were partners under the agreement, and that an action at law, therefore, could not be sustained.

Brough obtained a rule for a nonsuit on the leave reserved—he recited *Story on Partnership*, 27; 2 Q. B. R. 235; 13 Ea. R. 7; 1 Bing. N. C. 405; 4 B. & C. 867; 1 Rose, 297.

Richards showed cause—he cited *Collyer on Partnership*, 16, 17, 18, 132; *Story on Partnership*, sec. 218; *Gow*, sec. 3, pages 84, 85; 4 Ea. R. 144; 4 Esp. 182; 1 Campb. 330; 13 Ea. R. 538; 2 T. R. 482.

ROBINSON, C. J., delivered the judgment of the court.

We are clear that the defendant was not entitled to a nonsuit on the ground reserved at the trial, for there is an express covenant to account; the partnership, at any rate, must have ceased at Dawson's death, and though the parties during his lifetime may have been upon that footing that they could be treated as partners by third parties—they were not, by the terms of the instrument, partners *inter se*, so as to have no power to call each other to

account, except in a court of equity. The division of profits alone might make them partners as to the world, though by the stipulation between themselves, Hawley was not to be liable to losses, and they were therefore not partners *inter se*.

The effect of the agreement was, that the expense of dye-stuff and soap was to be deducted from the gross receipts—then what should remain after that alone had been deducted was to be divided equally. Hawley was to have his half without liability to losses, or any further deduction—while Dawson, out of his half was to pay all other expenses of the business. This brings it within the case of *Dry v. Boswell (a)*. I refer also to *Waugh v. Carver (b)*, *Foster v. Allanson (c)*, *Hesketh v. Exrs. of Robertson (d)*, *Venning v. Leckie (e)*, *Owston v. Ogle (f)*.

Our opinion is that the plaintiff and Dawson were not partners as between themselves, certainly; whether third parties could have held them liable as such, it is unnecessary to consider.

We see no objection on any ground to the plaintiff's recovery.

Per Cur.—Rule discharged.

PEGG, DEMANDANT, v. PEGG, TENANT.

Judgment as in case of a nonsuit.—Notice of countermand—costs of a commission not used, and Counsel fee not disbursed by defendant how far proper to be taxed.

Notice of trial was given by the plaintiff and *duly countermanded*. The defendant obtained judgment, as in case of a nonsuit, in consequence of the plaintiff not having proceeded to trial according to the practice of the Court, and claimed allowance in his bill of costs for a commission to examine witnesses in the United States; he also claimed a counsel fee and fee for preparing brief. These were refused by the Master, and upon a motion for revision of taxation it was *held per Cur.*, that under the circumstances of the case, the Master ought to have allowed the expenses the defendant had been put to under the commission, notwithstanding the plaintiff had countermanded his notice of trial in due time—and with respect to the brief and counsel fees, that the Master should allow no disbursement to counsel with brief, nor any charge with brief, which should appear either not to have been *actually* incurred, or to have been needlessly incurred. (See *Pegg v. Pegg*, Chamber Reports, July No., page 190.)

Mr. A. Wilson moved on the part of the tenant for revision of the costs taxed upon a rule issued in this cause in Trinity term, for judgment as in case of a nonsuit for not

(a) 1 Campbell, 330. (b) 2 Bl. 257. (c) 2 T. R. 479, 1 Saunders, 40, 45.
(d) 4 Ea. R. 144. (e) 13 Ea. R. 7. (f) 13 Ea. R. 538.

having proceeded to trial according to the practice of the court.

The cause was coming to trial at the last assizes for the Home District, and notice of countermand was served on the second of October, the assizes being to commence on the 5th October. The notice of trial had been served on the 22nd August.

On the 15th of September a commission issued to examine witnesses in the United States, which was taken to that country and several witnesses examined upon it. Their testimony being obtained was communicated to the attorney of the demandant, who expressed himself satisfied that it was so conclusive in favor of the tenant, that it would be useless for him to proceed further in the cause, and he accordingly countermanded his notice.

The parties were at issue on a plea of *ne unques accouple*, and the evidence obtained on the commission proved that when the demandant married the person under whose seisin she claimed dower, she had a husband still living in the United States, which of course rendered the second marriage void. This was clearly proved by the witnesses examined, and cross interrogatories were administered under the commission.

The complaint of the tenant was, that in taxing the costs on the entry of judgment, as in case of a nonsuit, the master had disallowed the costs of the commission to examine witnesses, and of the proceedings under it, amounting to 31*l.* 5*s.* 8*d.*; and also 8*l.* 5*s.*, being the charges for instructions for brief, preparing brief and counsel's fee, the services being rendered and disbursement made after notice of trial had been served.

Mr. Wilson, in support of his rule, cited 12 Mod. 560; *Viner's Abr. Costs A.* 3, pl. 3; *Hullock* 415; 3 M. and S. 89.

Helliwell shewed cause; he cited 1 M. and W. 321; 7 M. and Gr. 525.

ROBINSON, C. J., delivered the judgment of the court.

In the case of *Gordon v. Fuller*, which was before this court in Trinity Term, 1846, we determined that the costs of suing out a commission to examine witnesses, and of

the proceedings under it, were, like other costs in the cause, to be taxed, of course, against the losing party, at least where there had been no direction of the court to the contrary; and, indeed, that was not then a new point, for it had always been the practice of this court. I only refer to that case, because there the practice respecting the examination of witnesses upon interrogatories was much considered, upon several points which had been started; and it is satisfactory to find that since the granting commissions to examine witnesses has been placed in England, by the stat. 1 W. IV., ch. 22, upon a similar footing to that on which it has always stood in this court, under the provincial statutes of 34 Geo. III., ch. 2, and the 2 Geo. IV., ch. 1, the courts in England have considered the claim to the costs of such commissions in the same light as they have been considered here. The courts have, to be sure, by the English act, an express discretion to make such order in any particular case respecting these costs, as they may think right; but where they give no special direction, the costs go as costs in the cause to the party who succeeds. I should rather, indeed, say that the legislature has thought it right to place the matter on that footing—for such is the provision made by the 9th clause of the English act.

I refer also to *Prince v. Samo* (a).

Then the next question here is, whether the defendant having necessarily incurred the expense of this commission and proceedings under it, must finally bear the loss, because the plaintiff countermanded his notice in due time?

In England it requires, by the stat. 14 Geo. II., ch. 17, sec. 3 and 5, six days notice of countermand to save the parties from judgment, as in case of a nonsuit, or at least from the costs of the day.

Our stat. 2 Geo. IV, ch. 1, makes 4 days' notice of countermand sufficient here, and that notice was given; but if reason is to have any weight in the question, how can it be possible that the defendant can be justly held to have no claim to be re-imbursed in his necessary costs of preparing for his defence, because he received four days' notice of

(a) 4 Dowlg. 5.

countermand, when the expenses now in question must have been incurred many days before or the proceedings themselves would have been entirely useless.

The case referred to as reported in 12 Mod. 560, is consistent with reason and justice. There the court held that if on notice of trial the defendant prepares briefs, retains counsel, *and makes ready his witnesses* before the notice is countermanded, upon affidavit thereof and motion, he shall have such costs as the master shall tax. It would be as reasonable that the countermand of notice of trial should leave the defendant to pay the costs of his pleadings as the costs of his commission and interrogatories in this case, for he could no more have avoided incurring the one charge than the other, in consequence of the countermand. And the facts of this case would make it extremely unjust that the defendant should not be re-imbursed his costs, for the plaintiff joined in examining the witnesses—was informed of the evidence that had been given, and was convinced by it that the defendant must succeed, and on that ground withdrew his cause.

What costs attending the commission it may be reasonable to allow, is another matter, which must, in the first place, undergo the consideration of the master, upon such facts as may be placed before him.

Then as to brief and counsel's fee, the common practice should govern in this case, and we assume that the master would allow no disbursement to counsel with brief—nor any charge with brief—which shall appear either not to have been actually incurred, or to have been needlessly incurred.—2 E. R. 259; 7 C. & P. 629; 8 E. R. 393; 3 B. & P. 556; 1 M. & P. 438; 2 Dowl. 643; 8 B. & C. 317; 2 M. & Ry. 133; 4 Dowl. 5; 5 N & M. 318; 3 A. & E. 307; 1 Bing. N. C. 510; 1 Hodges, 36.

IN RE A. W. CLARKE, AND W. H. HEERMANS, COMMITTED
FOR CONTEMPT.

Power of Justice of the Peace to commit for contempt—The degree of formality required in the proceedings.

While a power resides in any court or judge to commit for contempt, it is the power or privilege of such court or judge to determine on the facts, and it does not belong to any higher tribunal to examine into the truth of the case.

A justice of the peace while sitting in the discharge of his duty, has the power, without any formal proceeding, to order at once into custody, and cause the removal of any party, who by his indecent behaviour or insulting language, is obstructing the administration of justice; but he has no power, either at the time of the misconduct, much less on the next day, to make out a warrant to a constable, and to commit the offending party to gaol for any certain time by way of punishment, without adjudging him formally, after a summons to appear for hearing to such punishment, on account of his contempt, and making a minute of such sentence.

A warrant to a constable to commit for contempt, containing a direction to *detain the party* till he shall pay the costs of his apprehension and conveyance to gaol, is defective.

On Monday the 10th September, 1849, James Hunter, Esquire, with two other magistrates, were investigating in the township of Whitby, a charge which had been made against certain persons of a conspiracy to defraud. Clarke and Heermans were present at the investigation, with a number of others, as spectators.

On the part of Mr. Hunter, one of the magistrates, it was alleged, that on the 10th September, during the investigation, Clarke and Heermans conducted themselves with great violence and indecency, openly accusing him of partiality and ignorance, and insulting him with the grossest language—that he ordered a constable who was present to take them into custody, which was no otherwise done, than by the constables telling them that they must *consider themselves* in custody—that the investigation continued till a late hour that night, and was resumed the next morning—that as soon as the court adjourned on that morning, he, Mr. Hunter, made out a warrant of commitment, and delivered it to the constable, who took Clarke and Heermans to gaol.

One of the other justices, Mr. Hurd, went away before the adjournment, and neither he nor the other justice appeared to have taken any part in the proceeding against Clark and Heermans, for the alleged contempt.

The warrant issued was in the following form :

“Home District, ——”

“To the constable of the Township of Whitby :

“Whereas, William Clarke, of the aforesaid district and township, physician, and William Henry Heermans of the same place, gentleman, being personally present before me, this day, during the examination of certain parties under an accusation of conspiring to defraud, have been guilty of

divers gross insults and contemptuous behaviour towards me, James Hunter, Esquire, one of Her Majesty's justices of the peace, in and for the said district, by accusing me of partiality, corruption, ignorance and injustice, in the execution of my said office, and by systematic attempts continued during hours to interrupt the judicial proceedings then going on, as well by the above insults and disorders as by using threatening language, to the great scandal and disgrace of justice: And whereas the above parties continued in the above course in disregard and contempt of repeated admonitions by me, the said justice.

"These are therefore to command you, the said constable, to take the bodies of the R. W. C. and W. H. H., and to convey them and deliver them into the custody of the keeper of the common gaol of the said district, at Toronto, together with this my warrant. And I hereby command you, the keeper of the said gaol, to receive the said R. W. C. and W. H. H., into your custody, in the said common gaol, and them there safely to keep, for the space of two weeks, and until they shall pay the said constable all lawful costs for their apprehension and conveyance to the said common gaol.

"Given under my hand and seal, this *tenth* day of September, 1849, &c., in the district aforesaid."

Clarke and Heermans being committed upon this warrant, applied, by *Mr. Cameron*, to this court to be discharged.

G. Duggan contra.

The cases cited were—14 Ea. R. 85; 2 Hawk. 180, ch. 16, sec. 19; Andr. 226; 6 T. R., 530; Bac. Abri. "Justice of the Peace."

ROBINSON J. C., delivered the Judgment of the court.

In the affidavits filed on the part of the magistrate who committed Clarke and Heermans, their conduct on the occasion referred to is described as having been in the highest degree outrageous and insulting. In an affidavit which they have filed, they almost wholly deny the truth of the charge, but we are not under the necessity of endeavouring to come to any satisfactory conclusion as to the truth of either statement; for where a power resides in any

court or judge to commit for contempt, it is the peculiar privilege of such court or judge to determine upon the facts, and it does not properly belong to any higher tribunal to examine into the truth of the case. But, however indecent may have been the conduct of the parties committed, we cannot do otherwise than discharge them from custody on this warrant.

It is not denied that a justice of the peace, while sitting in the discharge of his duty, examining parties upon a criminal charge, has power to protect himself from insult, and to repress disorder by committing for contempt any person who shall violently or indirectly interrupt his proceedings, or conduct himself insultingly towards him. And it may be assumed for the present, that where any person present behaves himself in such a manner as to obstruct the justice's proceeding, he may order him at once into custody, and direct him to be withdrawn, so as to remove at once the obstruction to the administration of justice; or may commit him till he finds sureties to keep the peace.

But this warrant imports that the justice intended to do more than remove for the time an obstruction to his proceeding; he directs the parties to be taken to gaol, and there imprisoned for two weeks, and until they shall pay all lawful costs of their apprehension and conveyance to gaol. That is a commitment which could only be good when made upon a sentence, or adjudication for an offence which required to be made and recorded before the warrant could issue; whereas, it appears here, that while the parties were in presence of the justice on the 10th, and at the time of their committing the alleged contempt they were not brought up and informed that they were charged with a contempt committed in open court, and adjudged to be punished for it, and condemned in a certain punishment, but they were allowed to depart, and on the next day, without calling on these parties to answer, or acquainting them with any intention to proceed against them for a contempt, the justice in their absence makes out a warrant to commit them for what they had done the day before, of which no such notice was taken at the time. The alleged contempt being

then a past offence, any court which could legally have called the parties to account for it on another day, must first have called upon them to answer, and must have heard them in their defence, otherwise it would be in the arbitrary discretion of a tribunal at almost any distance of time to condemn summarily, and without hearing, any party for an alleged bygone contempt, and to impose such a measure of fine and imprisonment as it pleased.

The justice could no doubt, on the first day, have directed a constable to remove the parties misconducting themselves from the court, upon view of the improper behaviour, and without any formal proceeding; but if he *had* noticed the matter on the instant, and in the presence of the parties, he could not at once make out a warrant to a constable and commit them to gaol for any certain time by way of punishment, without adjudging them formally to such punishment on account of their contempt, and making a minute of such sentence. Still less could he on the next day make a warrant without any adjudication to support it, and without summoning or hearing either of the parties.

There is a defect also in this warrant, in its direction to detain the parties till they shall pay the costs of their apprehension and conveyance to gaol. The statute 3 Jac. I. ch. 10, only authorises such expenses to be levied of the offender's goods; and if he could be imprisoned till he paid them, then it would be necessary that the amount of such expenses should be stated, or the gaoler would not know when he might discharge him.

For these reasons we must direct the prisoners to be discharged.

Per Cur.—Prisoners discharged.

OATES v. CAMERON.

Engine—Fixtures—Chattels—Trover.

Trover cannot be maintained for a fixture, so long as it remains annexed to the freehold.

An engine fastened into and bolted upon a wooden frame, which was not merely laid on the ground, but was let into it—the earth being displaced to let in the beams or timbers which supported or formed part of the platform—is a fixture, and a chattel for which trover might be brought; and it is not less a fixture because it could be taken down and removed without defacing or removing any part of the walls of the building within which the wooden frame is situate.

Trover for a steam engine.

One Shaw having purchased from Naylor & Co. certain premises in Toronto, on which an axe factory was carried on, and on which a small steam engine was erected, used in the business, mortgaged it to Naylor & Co. for the unpaid purchase money. While he was in possession under these circumstances, he purchased a new steam engine from the plaintiff to replace the old one, and had substituted it for the other. In the meantime, and before this new engine had been put up in place of the other, Naylor & Co. assigned their mortgage to this defendant. Neither the mortgage to Naylor & Co., nor the assignment of it to the defendant, made mention of the engine or machinery.

The mortgage to Naylor & Co. was made on the 27th of July, 1841. It mentioned only the land, 2-9ths of an acre, with all buildings, &c., and appurtenances, in the usual language of such deeds. It was made to secure 1200*l.* in six years, by instalments.

On the back was indorsed a memorandum, dated 23rd November, 1844, signed by the trustees of Shaw, who had in the meantime become insolvent, that the premises within mentioned were insured, and were to be kept insured, and that in case of fire the sum to be received on the policy should be expended in rebuilding *the foundry, and putting it in a good and sufficient state for service.*

The defendant being in possession of the premises as assignee of the mortgage, had refused to allow the engine to be removed, and insisted upon retaining it as annexed to the freehold.

The plaintiff Oates was the surviving partner of Messrs. Elliott & Co., iron founders, who sold the new engine to

Shaw, upon which occasion a written agreement was executed between those parties (4th August, 1846), by which Shaw agreed to pay 250*l.* for the engine, which was "to be put up by Elliott & Co., *and connected with the boiler in the axe factory in Sheppard-street*; all materials *for the foundation* were to be furnished by Shaw; the old engine and boiler were to be taken in payment for whatever they might fetch, if sold—if not sold by the time the new engine was to be paid for, viz. 18 months, then it was to be taken by Elliott & Co. at a valuation; and the agreement lastly provided, that the engine shall be deemed, and it is thereby declared to be, collateral security to Elliott & Co. until the full completion of the payments.

Under this agreement the plaintiff, surviving partner of Elliott & Co., claimed to have the new engine given up to him, the price not having been yet paid by Shaw, and upon the defendant's refusal he had brought this action of trover.

The engine in question was put up in a brick building, which stood on the land mortgaged; the foundation on which it stood was formed by four pieces of squared timber, about 12 feet long each, framed together and bedded in the earth enclosed by the building, being detached from the walls, and the top of the frame being level with the ground floor.

On the platform of which these timbers were the foundation, a second wooden frame was placed, about four feet square by two feet deep, and on this frame the iron bed-plate of the engine rested; four corner bolts passed through the two frames and the iron bed-plate, binding the whole together, which bolts were fastened at the bottom by a key or wedge, and at the top by a screw nut on the upper side of the iron bed-plate; the whole engine, with the exception of the outer end of the inner branch shaft, rested on this frame, and could be removed by taking out the keys or wedges below or unscrewing the nuts above; the end of the crank shaft revolved in a plummer block, which was bolted by bolts and nuts to a cast iron frame inserted in the brick partition wall of the building. By unscrewing the nuts on these bolts, the shaft and plummer block might be

removed—and thus without removing or injuring any portion of the building, the whole of the engine could be entirely removed. The frame work of timber on which the engine rested was all put up by Shaw, and the plaintiff made no claim to it or to the cast iron frame in the wall, which was also put up by Shaw. The old engine was still at the factory, and was never taken away by the plaintiff.

Verdict for the defendant, with leave to move to enter a verdict for the plaintiff.

Hagarty obtained a rule to enter a verdict for the plaintiff on the leave reserved—he cited 3 Q. B. R. 734; 1 Q. B. R. 51; 4 M. & W. 687; 3 B. & C. 76; 2 B. & Al. 167; 5 B. & Al. 826; 3 Dea. & Chy. 765; 2 C. & M. 153; 7 Jurist, 771; 6 N. & M. 367; 4 A. & E. 884; 2 Ea. 88; 9 Ea. 215; 1 M. D. & De Gex, 139.

A. Wilson shewed cause—he cited 8 Q. B. R. 913; 12 Clk. & Fin. 312; 11 Jurist 89, 748.

ROBINSON, C. J., delivered the judgment of the court.

The first question for us to determine is, whether this new engine sold by the plaintiff to Shaw, and erected in the factory as described above, is in the widest sense of the term a fixture, without considering what privileges the party who put it there might have to remove it and treat it as a chattel, by reason of any particular circumstance attending its erection; because, if it be a *fixture* that is annexed to the soil in contemplation of law, then so long as it remains so annexed, trover cannot be maintained for it. This is quite clear, and such cases as *Wandsbrough et al. v. Merton (a)* and others, that were cited in the argument, are not in opposition to the clear principle that trover can be only brought for chattels, because in those cases the ground on which the action was held to lie was, that the building being only rested by its weight on pillars or blocks, and not being attached to the soil, was in fact a chattel.

Neither does any case conflict with this principle, in which the court has refused to arrest judgment in trover, when the plaintiff had recovered for the conversion of what were called in the declaration fixtures; because the court

(a) 4 A. & E. 884.

there, by some exercise of ingenuity certainly, held that they might intend in favor of the verdict that the things sued for were only fixtures in the ordinary sense, but were at the time separated from the freehold and not in fact fixed.

As the defendant's counsel made it one of the grounds of his argument that trover would not lie for the engine, because it was in fact fixed to the freehold, we are not at liberty to treat the case as if that objection were waived by assent, as it would seem to have been in some of the English cases, in order to try the right.

Unless, therefore, we can hold that the engine, which at the time of this action brought stood in the state described was a chattel, our judgment must be for the defendant. In my opinion, we cannot hold it to be a chattel while so affixed. It was fastened into and bolted upon a wooden frame, which is not merely laid on the ground, but is let into it—the earth being displaced to let in the beams or timbers which support or rather form part of the platform.

It is united to a fabric previously attached to the ground, and not merely brought into juxta-position with it. It is not the less a fixture because it could be taken down and removed without defacing or removing any part of the walls of the building. Standing as it does, bolted into a frame, which is supported upon and attached to a platform, of which the foundation is let into the soil, it would not be seizable as a chattel under an execution against Shaw, if he had continued to be the owner of the freehold, and had made no mortgage of the land, nor given any one a mortgage on the engine. I refer to the case of *Stewart v. Lombe* (a) This makes an end of the question if we are expected to determine whether the engine in its present state can be the subject of an action of trover.

Upon the general law applicable to the subject, the case cited on the argument of *Fisher v. Dixon* (b) is a most satisfactory authority, and appears to me to be decisive against the plaintiff's claim; for in this case, as in that, Shaw was the owner of the freehold when he erected the

(a) 1 Br. & B. 506. (b) 12 Cl. & Fin. 312, 328.

engine and annexed it to the freehold. It is not necessary, I think, to look out of that case and the authorities referred to in it for determining the question of right between these parties; and though in the judgment by which it was determined, the case of *Trappes v. Harter* (*a*), and the earlier case of *Lawton v. Lawton* (*b*), were admitted to be, apparently at least, at variance with the decision, yet we cannot hesitate, I think, to adhere to *Fisher v. Dixon* as a safe guide, when the question of fixtures arises under such circumstances as the present.

Here we find Shaw purchased the premises—an axe factory—and gave a mortgage back to secure the purchase money, 1200*l*. We cannot be certain that the mere land and buildings, divested of the machinery erected on the factory, would have been considered sufficient security for the money. Whatever should, on the most comprehensive definition of the term fixture, be considered as annexed to the freehold, must be considered in such a case to pass under a deed given by the owner of the land. Then, although the present engine is not the one which stood in the building in 1841, yet Shaw, after giving his mortgage then, could not be allowed to diminish the value of the security by removing that engine and substituting another for it, upon which he might, for his own convenience, have engaged to give a lien, or rather a security to a third party. And it is very material so to consider, as regards the justice of the case, that the indorsement made on the mortgage to Naylor & Co. by Shaw's trustees, shews that the security was, by them at least, understood and admitted to cover not merely the soil and building conveyed, but that which was indispensable to the important use made of the building—namely, the foundry, which was to be restored in case of fire to a good and sufficient state for service, which we may take it for granted it could not be without an engine.

Per Cur.—Rule discharged.

(*a*) 2 C. & M. 153. (*b*) 3 Atk. 13.

NICHOLS V. MCGILL.

Plea of coverture to an assumpsit by a third party, that if the plaintiff would convey land to a married woman and take a mortgage, the mortgage money should be paid.

Where the defendant promises—that if the plaintiff would convey a certain property to Mrs. A. B., and take a mortgage from her for payment of the purchase money by a certain day, the money should be paid on that day: Held *per Cur.*—reversing the judgment of the court below—that an action of assumpsit would well lie against the defendant on the non-payment of the mortgage, and that the plea of Mrs. A. B.'s coverture would be a bad plea. *Semble*, however, that such a plea would be a good defence, where a promise of the defendant is set up in the declaration, as founded on a consideration of plaintiff's forbearance to sue a married woman for a debt alleged to be *previously due* by her.

Appeal from the District Court of the Home district.

Declaration: assumpsit, averring in substance, that in consideration that plaintiff would sell a certain lot of land to Mrs. Shell, and receive a mortgage on the purchase money, the defendant promised that the mortgage money should be paid to the plaintiff on the day named in the mortgage. Averment—that confiding &c., the conveyance, bargain and the mortgage taken, &c. Breach, that neither Mrs. Shell nor the defendant paid the mortgage money on the day, &c.

Plea: at the time of the said Mary Shell being indebted to the plaintiff, and of the defendant's making his promise, &c., coverture of said Mary Shell.

Demurrer to plea, as an insufficient answer to the declaration.

The court, on the argument of the demurrer, held the plea good, and the declaration bad.

From this judgment the plaintiff appealed.

ROBINSON C. J., delivered the judgment of the court.

We consider the plea bad in this case and the declaration sufficient.

The case of *Maggs v. Ames*, 4 Bing. 470, which was taken to be an authority to shew the sufficiency of the plea, as a defence, does not seem to have disposed of the question that presents itself in this case. The court only applied themselves to the other point, in the case upon the Statute of Frauds, and the soundness of the decision in respect to that point, which alone was determined, has been questioned. If however, it had been expressly determined in

that case, that there was a want of consideration for the defendant's promise, the decision would not have applied to the present case, which more nearly resembles the state of facts supposed in the passage next but one to the concluding sentence of the judgment as reported, and which the court intimated would have supported the promise.

The difference lies in this: where there is an alleged pre-existing debt against a married woman, and a third party engages that if forbearance shall be shewn to her he will guarantee the debt, then such promise is held to be without any valid consideration, because there being in fact no debt which the creditor can enforce, there is no value in his forbearance; but here the defendant engaged that if the plaintiff would convey a certain property to Mrs. Shell, and take a mortgage from her for payment of the purchase money by a certain day, the money should be paid on that day.

A valid consideration moves at once from the plaintiff, he conveys the land, confiding in that promise, and there is nothing illegal in what the other party undertakes. Why then shall he not be bound? It may or may not have been known to either party, that Mrs. Shell had a husband then living. We may suppose reasonably that they did not know it, or it would have seemed to them an idle act to take a mortgage from her, but whether they knew it or not, we think the promise of the defendant would be equally binding. If the defendant promised, with a knowledge of that fact, then we must have understood that he was assuming a primary obligation, for there was no one else equally liable. If he was ignorant of the coverture, then he may have supposed he was incurring only a secondary liability; but in either case, his undertaking was express, that the money should be paid on the day; a legal undertaking supported by a valuable consideration, moving from the plaintiff to a third party, at the defendant's request, and therefore as good for the purpose of supporting an assumption as if it had moved to himself.

Then, if the promise was good, as we think it clearly was, the breach charged is consistent with the words of the

undertaking, and we see no ground on which the validity of the promise can be questioned, for clearly it is not necessary that the declaration should shew the promise to have been made in writing.

The plea, we think, is no answer to this declaration, though it would be a defence where a promise was set up, founded on a consideration of forbearance to sue a married woman for a debt alleged to be previously due by her. The plaintiff here conveys his property, relying upon the defendant's promise, and can undoubtedly insist on its performance.

The declaration not being supported when the demurrer came on below, it was considered, I suppose, that the plaintiff intended to give up the case, and the point on that account engaged less attention. If the plaintiff had attended on the argument, and assented to the judgment passing against him, we must have considered whether he could be afterwards allowed to appeal, but the circumstances are different when the pleading is merely not supported.

Per Cur.—Judgment below reversed, and judgment for the plaintiff on the demurrer.

QUEEN'S BENCH.

HILARY TERM, 1850.

Present—THE HON. J. B. ROBINSON, C. J.

“ “ MR. JUSTICE DRAPER.

“ “ MR. JUSTICE BURNS.

NOTE.—The Hon. Mr. JUSTICE MACAULAY, Mr. JUSTICE McLEAN, and Mr. JUSTICE SULLIVAN, took their seats this term in the new Court of Common Pleas.—the Hon. Mr. JUSTICE MACAULAY as Chief Justice, and the Hon. Messrs. McLEAN and SULLIVAN as Puisne Judges.

THE BANK OF UPPER CANADA V. BOULTON.

Averments in declaration—*The effect of which is to contradict by parol evidence a written contract.*

The defendant agreed that upon the plaintiffs assigning to him a life policy of insurance for 5000*l.* sterling, he would pay them 6000*l.* currency; and in suing the defendant for the non-payment of the 6000*l.*, the plaintiffs averred that the

policy which the defendant was to receive, was one for 3000*l.* only, and not for 5000*l.*, and that he (the defendant) well knew it. On demurrer to this averment, *the Court* held the declaration bad—upon the general principle of law, that the terms of a written contract could not be varied or controlled by parol testimony.

The plaintiffs sue on a bond made to them by the defendant in a penalty of 12,000*l.*, and they state that the bond was made subject to a condition in which it is recited that Sir Allan McNab had effected an insurance on his life, for the sum of 5000*l.* sterling, in the Eagle Life Insurance Company of London; and had by indenture of the same date with the bond assigned the same to the plaintiffs as security for 6000*l.* currency, due by him to the plaintiffs, and that the plaintiffs had agreed to receive the same as such security, for six years, provided Sir Allan McNab would secure to them the payment of the premium for such insurance, and of the interest on the 6000*l.*, and also the payment of the 6000*l.* at the end of the six years if required by the plaintiffs; and that this defendant had agreed to become personally bound to the plaintiffs for these payments; and then the plaintiffs state in their declaration that the condition of the bond on which they are suing is, *that if the defendant should pay to the plaintiffs the premium on the said policy of assurance so effected by Sir Allan McNab, and assigned to the plaintiffs (The Bank of Upper Canada) as they should become due, and should pay to the plaintiffs the interest on the 6000*l.*, half yearly, till the principal should be fully paid; and should, if required by the plaintiffs upon assignment by them of the said policy, at the end of six years from the date of the bond, pay to the plaintiffs the full sum of 6000*l.*, and release the plaintiffs from all further liability on account of the said policy of assurance, then the obligation should be void.*

“And the plaintiffs in fact say, that the said policy of assurance above referred to, was in truth a policy of assurance for the sum of 3000*l.* only, for which sum alone the said Sir Allan McNab had effected an insurance upon his life, in the said Eagle Life Assurance Company, as was well known to the said defendant at the time of the execution of the said writing obligatory, though therein declared by them to be for the sum of 5000*l.*”

The plaintiffs then aver, that although they did at the expiration of six years from the date of the said writing obligatory—viz., 1st February, 1849—require and demand from the defendant payment of the said 6000*l.* in the condition mentioned, and did on that day duly assign and set over to the defendant the said policy of assurance therein-before referred to, yet the defendant did not pay to the plaintiffs the said 6000*l.*

The defendant craved oyer of the bond and condition, and having set them out on the record, demurs; assigning for causes, that the policy should have been set forth—that the plaintiffs are not at liberty to aver against the policy as recited in the condition—that the policy stated in the assignment of breach is not averred to be the same as that stated in the condition—that it is not shewn that the demand to pay the 6000*l.* was made in writing by the resolution of the plaintiffs, and under their corporate seal—that the demand is alleged to have been made before the assignment of the policy; whereas the defendant could not be called upon to pay the 6000*l.* before the policy was assigned.

Cameron Q. C. for the demurrer.

Vankoughnet contra.

The authorities cited were, Broome's Legal Maxims, 267, 408, 292; Hurlston on bonds, 31; Pitman, P. and S. 86; Lord Raymond, 703; 6 T. R., 675; 3 B. & Ad., 640; 2 Q. B. R., 2731; 8 B. & C., 568; 1 Saund. 66, (a) note; 2 H. B., 663; 6 T. R., 381; 3 A. & E., 883; 1 A. & E., 804; 1 Br. C. C. 93, 350; 1 Saund. 325, note 4; Hob. 207; 11 M. & W., 283; 5 B. & Ad., 914; 2 B. & P., 302; 8 A. & E., 209; Com. Dig. Cons. D.; 2 Bl. Com. 156; 1 Roll. Abr. 419; 7 T. R., 381.

ROBINSON C. J., delivered the judgment of the court.

We were told upon the argument of this case, that the judgment of this court was only desired upon the sufficiency of the declaration as it regards the breach in not paying the 6000*l.* at the end of the six years. The other alleged cause of action, as regards the not paying the premium or the interest upon 6000*l.*, having, as we suppose, been compromised.

Then the case stands thus on the pleadings, as regards the breach in not paying the 6000*l.*—The plaintiffs sue on a bond made to them by the defendant, in a penalty of 12,000*l.*, and they state that the bond was made subject to a condition, in which it is recited that Sir Allan McNab had effected an insurance upon his life for the sum of 5000*l.* sterling, in the Eagle Life Insurance Company of London; and had by indenture of the same date with the bond, assigned the same to the plaintiffs, as security for 6000*l.* currency due by him to the plaintiffs, and that the plaintiffs had agreed to receive the same as such security for six years, provided Sir Allan McNab would secure to them the payment of the premium for such insurance, and of the interest on the 6000*l.*, and also the payment of the 6000*l.* at the end of the six years, if required by the plaintiffs; and that this defendant had agreed to become personally bound to the plaintiffs for these payments; and then the plaintiffs state in their declaration, that the condition of the bond on which they are suing is, *that if the defendant should pay to the plaintiffs the premium on the said policy of assurance so effected by Sir Allan McNab, and assigned to the plaintiffs (the Bank of Upper Canada) as they should become due, and should pay to the plaintiffs the interest on the 6000*l.* half yearly, till the principal should be fully paid; and should, if required by the plaintiffs upon assignment by them of the said policy at the end of six years from the date of the bond, pay to the plaintiffs the full sum of 6000*l.*, and release the plaintiffs from all further liability on account of the said policy of assurance, then the obligation should be void.*

Having thus stated the bond and condition, the plaintiffs add this averment, which gives rise to the question before us: “And the plaintiffs in fact say, that the said policy of assurance above referred to, was in truth a policy of assurance for the sum of 3000*l.* only; for which sum alone the said Sir Allan McNab had effected an insurance upon his life in the said Eagle Life Assurance Company, as was well known to the said defendant at the time of the execution of the said writing obligatory, though therein declared by them to be for the sum of 5000*l.*”

The plaintiffs then aver, that although they did at the expiration of six years from the date of the said writing obligatory—viz., 1st February, 1849—require and demand from the defendant payment of the said 6000*l.* in the condition mentioned, and did on that day duly assign and set over to the defendant the said policy of assurance thereinbefore referred to, yet the defendant did not pay to the plaintiffs the said 6000*l.*

The defendant cravedoyer of the bond and condition, and having set them out on the record, demurs; assigning for causes that the policy should have been set forth—that the plaintiffs are not at liberty to aver against the policy as recited in the condition; that the policy stated in the assignment of breach is not averred to be the same as that stated in the condition—that it is not shown that the demand to pay the 6000*l.* was made in writing by the resolution of the plaintiffs, and under their corporate seal—that the demand is alleged to have been made before the assignment of the policy; whereas the defendant could not be called upon to pay the 6000*l.* before the policy was assigned.

And also, because the assignment of the policy should have been shewn, and should have been stated to have been made under the corporate seal.

The principal question in the case is, whether the plaintiffs can be allowed to aver, in opposition to the written instrument on which they are suing, that the defendant was bound to pay them 6000*l.* on receiving an assignment of a policy of insurance for 3000*l.* sterling, instead of one for 5000*l.*, which is what the bond plainly entitled him to expect.

The plaintiffs' having set out the condition onoyer, makes no difference in the terms of this question, for the plaintiffs had already set it out in their declaration, and had stated it truly and exactly according to the writing; and, taking the case upon the declaration with or without theoyer, I consider it plain that the defendant must have judgment upon the demurrer, for the plaintiffs cannot be allowed to make an averment which would so entirely change the substance and effect of the written contract.

Those cases do not apply, of which there are several in the books, where courts of law have corrected errors and supplied defects which were quite apparent on the face of the instruments, by reading them as it was evident they were intended to be. One instance of this is, where in one part of a conveyance the grantor's name was inserted when it was evident the grantee's name was intended. Another instance is, where the word "pounds" was accidentally omitted. In such cases as these, the court does not admit any evidence or entertain any suggestion inconsistent or at variance with the deed; they merely give to it as a whole that effect which they see upon the face of the very instrument itself it was plainly intended to have—they read the instrument as they see (without looking out of the instrument), it was meant to be read.

But here the plaintiffs, without alleging that there was any fraud or imposition practised, aver that the defendant, who bound himself as plainly as words can speak to pay 6000*l.* currency upon receiving an assignment of a certain policy of insurance for 5000*l.* sterling, nevertheless aver that the policy which he was to receive was one for 3000*l.* only and not for 5000*l.*, and that he well knew it.

The defendant on his part having executed the bond as it stands, would be clearly estopped from making any averment of that nature. He clearly could not plead that the debt which was due by Sir A. McNab to the bank was only 4000*l.* and not 6000*l.*, and that this was well known to both parties; nor, which is more to the point, could he plead that the policy which he was to receive was a policy for 6000*l.*, and not for 5000*l.* He would be told on authority too clear to be resisted, that he was estopped by the writing he had signed, and must perform his undertaking, unless he could shew fraud or could shew very clearly that there had been a mistake which a court of equity could rectify.

But when the obligor is thus inflexibly held in a court of law to the terms of the writing, it is manifestly necessary for his protection, and must follow as a necessary consequence, that his position cannot be changed by the obligee

being allowed to set up a new contract by parol evidence, which would entirely change the effect of the obligor's undertaking.

The obligor may surely say, if I am bound, whatever the truth may be, to admit that I must pay you 6000*l.* on receiving a policy assigned for 5000*l.*, I must at least have the advantage of being able, on the other hand, to stand upon my contract, and to deny that I engaged to make the payment on any less advantageous terms. That which I am bound to admit I am also entitled to insist upon. It cannot be at the same time taken to be incontrovertibly true for the purpose of binding me, and yet capable of being contradicted for the purpose of increasing the burthen of my undertaking.

The obligor may say justly that, whether it was true or untrue that the plaintiffs had such a policy as is recited, his contract was based on that supposed state of facts, and that a new contract cannot be made for him by parol. His security is, that what he has bound himself to admit is that by which his contract in its terms is governed; so that if it cannot be altered by parol evidence in his favor, it cannot on the other hand be altered by parol evidence to his prejudice.

If, instead of a bond, an agreement had been drawn out between these parties in which the same things had been recited as are set forth in this bond, and if both had signed, then it would have been very clear that both would be equally estopped from denying the truth of the recitals, and consequently that the plaintiffs could not have made such an averment as they have made in their declaration. But I consider that when the plaintiffs, having taken from the defendant a bond in its present form, sue him upon it as for a breach of the condition, they are as much held to the terms of that condition as if they were parties executing the writing; they cannot treat the writing as conclusive in their favor in regard to the statement of facts contained in it, and not conclusive against them.

Without reference to what may have been the fact in this particular case, the obligor in any such case may have been

content to acquiesce in the obligee's own representation of the security which he had, and which he was prepared on his side to hand over as the consideration for the contract into which the obligor was about to enter ; and there would be no imprudence in this : for if on the one hand the obligor would be held concluded by the recital in the bond of the consideration which he was to receive, his security on the other hand would be, that the obligors on their part could no more depart than he could from the terms of the written instrument, and must therefore produce and assign such a security as would entitle them by the condition to demand the money.

The plaintiff's counsel, while arguing this case, cited no instance in which an averment of this nature against the terms of a written contract, varying its effect in a most important particular, had been permitted in a court of law ; and indeed if it could be so permitted, I do not see what security or value there would afterwards be in written contracts as distinguished from verbal.

Those cases which have been decided upon the principle of *falsa demonstratio non nocet*, and which are cited in the books in illustration of that maxim, do not apply. They have chiefly arisen upon devises and grants of real estates, where it has plainly appeared on the face of the instrument what was the thing really intended to be given or granted, and where the only occasion for a doubt has arisen, from some error in a description unnecessarily added to that which had been plainly enough designated before.

If in this case, instead of a policy of assurance, it had been a mortgage given by Sir A. McNab upon a certain estate, which the bank held, and which they were to assign to the defendant, and if in describing it in the bond the number of acres which the estate contained had been added, and had been stated inaccurately, that would have furnished a case of the kind I refer to. In that case, the obligor would have been plainly told that he was to have a mortgage upon a certain property, known by name, and whether its contents were exactly stated or not, he would have had in substance what he contracted for ; but if the

bond recited that the obligees held a mortgage from Sir A. McNab for 6000*l.*, which they were to assign as the condition of the obligor's payment, surely the obligor could never be compelled to accept a mortgage for 600*l.* instead, upon an averment that the mortgage was in truth for that amount, and that he knew it.

If the plaintiffs' declaration as it now stands, could be sustained, then they could equally have been allowed to aver that the policy was in truth for 300*l.*; or was a policy effected with a different office, or was an insurance for seven years, and not for life. I can see no limit to the application of such a principle, if it can be admitted at all.

If a bond were made by B., reciting that a sum of 5000*l.* stood in the name of A., in the Bank of England, invested in funds of a certain description; and binding himself that he would upon that stock being transferred to him, convey a certain estate to A., he might as well be told that the amount of stock in A.'s name was only 500*l.*, and that he knew it, and that he was therefore bound to accept the 500*l.*, and convey the estate. So if A. were to enter into a bond, reciting that B. had been appointed to a certain office, and binding himself in a penalty that he would faithfully execute its duties, it might on this principle be averred that the office in fact was a totally different one, and that the obligor knew it, and was therefore bound to answer for the punctual performances of its duties, though they might be of a much more responsible kind.

No case could shew more clearly than the one before us the danger of admitting such averments in direct contradiction of the writing; for, though we can look only at the record in considering this demurrer, it was intimated and not denied on the argument, that the security to be assigned to the defendant was in fact intended to be a life assurance to the amount of 5000*l.*; but that the mistake was in assuming that there had been one policy in the Eagle office covering that amount—for that office had in fact taken only 3000*l.* on the risk, and another office had taken the other 2000*l.*, so that the averment was not according to the fact.

It is not sufficient to say, that the defendant could have denied the truth of the averment, and that he should have done so instead of demurring, for the defendant has a right to object that that leaves him to the chance of what may be proved by parol testimony, and depending on the recollection of witnesses; whereas he has a right to stand upon his sealed condition, which the obligees cannot affirm as to one part, and contradict as to another; and that as he cannot claim to be acquitted upon doing anything less than he undertook to do, so neither can they sue him upon his undertaking, and yet gainsay what the instrument expresses was the equivalent to be given him.

I do not refer to any authority, for the general principle that the terms of a written contract are not to be varied or controlled by parol testimony, for there is no point that stands more clear or is sustained by more numerous decisions, and that the present is a case within the principle, I consider to be too clear to admit of doubt.

I am authorised by the Chief Justice of the Common Pleas, and by Mr. Justice McLean, before whom this case was argued, while they were judges of this court, to state their entire concurrence in this opinion. Mr. Justice Sullivan, who also heard the argument, had made up his mind I believe, to a different view of the question.

Considering as we do, that the defendant is entitled to judgment on the demurrer, on the principal ground on which it was argued, it is immaterial to discuss any other ground that was taken against the declaration.

We have been called upon to dispose merely of a question of pleading upon the record. What remedy the plaintiffs may have against the defendant by any other form of declaring or upon any other proceeding, either in law or equity is for their consideration, with the knowledge which they have of the facts of the case.

Per Cur.—Judgment for the defendant on the demurrer.

MCLEOD V. EBERTS ET AL.

Liability of owners of boats for loss of parcels when delivered to a person on board as a private individual or as an officer of the boat.

Where a person delivers a parcel to carry to a person on board a boat, not as to a servant of the owners, but to be carried by such person himself, either for

reward or otherwise, the person so engaging to carry it is *alone* responsible for its loss.

If however, the parcel is delivered to the person on board, to be carried, not on any *private* understanding, but as an officer of the boat, the owners of the boat would be chargeable with the loss, though they were to have no reward for carrying; but then, to establish the liability of the owners, it would be necessary for the jury to find gross negligence in the owners or their servants, or at least a want of that ordinary care which a prudent man would take of his own goods.

The plaintiff sued the defendants for the loss of a bag containing money and bills to the amount of 143*l.* 7*s.* 0*d.*, delivered on board the defendant's boat, to be carried for the plaintiff from Amherstburg to Chatham.

The declaration contained three counts. In the first, the plaintiff charged the defendants as common carriers, upon their promise to carry safely.

In the second count they charged them as owners of the steamer in which they were accustomed to carry goods for hire, from Amherstburg to Chatham; no *assumpsit* was laid in this count, but the defendants were charged upon their duty to carry safely.

In the third count the defendants were charged, not as common carriers, but on an express *assumpsit* to carry safely.

The defendants pleaded to each of the counts severally. First, denying the receipt of the parcel; 2ndly, non *assumpsit*, and a third plea demurred to.

The case was tried at Sandwich, before Mr. Justice Draper. It was proved that in October, 1848, the plaintiff's clerk took down a small bag containing 143*l.* 7*s.* in bills and coin, and delivered it on board the steamer "Brothers," belonging to the defendants, plying between Amherstburg and Chatham, to be carried to Chatham. It was delivered to one Robinson the clerk, on board the boat, in his office there, just as the boat was about to start.

The clerk knew that it was money, but was not told the amount; he put the bag into his desk, which he does not appear to have locked, and when they got to Chatham it was gone. It must have been stolen by some person.

The question on which the case turned was, whether the parcel had been delivered to Robinson as clerk of the boat, and to be carried in the ordinary manner as by the owners

at their risk, and for a reward to be paid to them, or delivered to Robinson privately and individually, to be carried by him either as a favour to the plaintiff or for a gratuity to be paid to himself by the plaintiff, in which latter case the defendants would not be liable. The jury found for the plaintiff 143*l.* 7*s.* 0*d.*

Wilson of London obtained a rule for a new trial, on the ground that the verdict was contrary to law and evidence, and the Judge's charge, or for misdirection. *Dr. Connor* shewed cause. The cases cited were—2 C. & Ker. 681; 17 Law Jour. Exch. 271; 2 B. & P. 614.

ROBINSON C. J., delivered the judgment of the court.

A good deal of evidence was given on the trial, tending strongly to shew that the defendants were not in the habit of carrying in their steamer packages of money for individuals for hire. There was in fact much evidence that they had not hitherto done so, except in regard to public money transported for the commissariat, when a guard was always sent with it; and though the plaintiff attempted to prove to the jury that the defendants had in other instances carried parcels of money for hire, yet I cannot say that I think he did establish that they had done so in any instance.

Then the evidence on the defendants' side, which I think was much strengthened by the general tenor of the testimony given by the plaintiff's witnesses, was strong to shew that the general, I think it might be said the universal practice, was to give any parcel of money either to one of the owners when on board the boat, to be carried as a mere matter of favor without charge, or to the captain or mate, or clerk or steward, and sometimes to a mere hand on board the boat, to be carried either gratuitously or upon such other understanding as there might be between the parties.

The letters given in evidence on the trial are consistent with this account; and it was expressly sworn, and is not denied, that this plaintiff in particular had, on former occasions, had money carried by an individual on board the boat as a matter entirely between that individual and himself, and on such a footing as clearly did not make the owner of the boat responsible.

Nothing is clearer, and it is consistent with common sense and justice, that if a person delivers anything to carry to a person on board a boat, not as to a servant of the owners, but to be carried by such person himself, either for reward or otherwise, the person so engaging to carry it is alone responsible. The cases of Middleton v. Fowler and another, 1 Salk. 282; and of Butler v. Basing, 2 Car. & P. are cases of that kind.

We fear the jury have not given due weight to some of the evidence in this case, or have misapprehended its effect. The sum is considerable, and when we reflect how great the liability is which common carriers unavoidably incur, we cannot but feel it to be important that this liability should not be stretched beyond its just limit.

The whole evidence seems to lead strongly to the conviction that the plaintiff must have considered he was employing, and intended only to employ Robinson, as he had before employed McEwan in similar cases, to do this for hire, either on the footing of a personal accommodation, as between Robinson and him, or for a small gratuity to be paid by him, as he had before paid McEwan, whose evidence is very strong in favor of what the defendants contend for.

The plaintiff has not filed affidavits, denying anything alleged in the evidence, or in the affidavits of Robinson, or of Walter Eberts.

In one respect, I am apprehensive there may have been some misunderstanding on the part of the jury. It was correctly stated to them, that it would be no answer for the defendants to say (if the fact were so), that they were to have no reward for carrying the money, if the jury were satisfied that it was really placed in their charge by being given to their servant, not on any private understanding to be carried by him for the plaintiffs, but as an officer of the boat. No doubt they might in such case be chargeable, though they were to have no recompense for carrying, but then to establish their liability if they received the parcel on that footing, it would be necessary that the jury should find gross negligence in the defendants or their servants, or

at least a want of that ordinary care which a prudent man would take of his own goods. The celebrated judgment of Lord Hott in *Coggs v. Barnard*, Lord Raymond, 909; and the case of *Shiel and Blackburn*, 1 H. B. 158, support this principle clearly; and in *Nelson v. McIntosh*, 1 Starkie C. 238, Lord Ellenborough put the case (which was one of gratuitous bailment) to the jury on that distinction.

I do not observe that this case was left in that manner to the jury, and if it were, I should still think that the ends of justice require a re-consideration of the evidence.

Per Cur.—New trial on paying costs.

VANKOUGHNETT V. ROSS.

Liability of heir on ancestor's covenant for good title.

In this Province (though not in England), the heir is only liable, on descent of lands, for the *debts* of his ancestor. He is not liable for unliquidated damages—as, for instance, upon his ancestor's covenant for good title.

Action on covenant for title. One Jacob Ross covenanted for himself and his heirs with the plaintiff, that he had good title to convey certain lands to the plaintiff. Breach, that he had no title, and averring that another party was at the time seised.

The defendant being sued as heir of Jacob Ross, pleaded that he had not at the commencement of this suit, nor at any time before or since, any lands by descent from his father Jacob Ross, in fee simple.

The plaintiff replied as by statute, that the defendant, after the death of his father, and before the commencement of this suit, viz. : on 1st January, 1847, had divers lands, &c., by descent, as heir to the said Jacob Ross, in fee simple, whereby he might have satisfied the plaintiff, and this he is ready to verify.

The defendant demurred : assigning for cause that the replication was no answer, and that it ought to have concluded to the country.

Richards for the demurrer.

Vankoughnet contra.

The authorities relied upon were—7 Ea. R. 128; 2 Saund. 8.

ROBINSON C. J., delivered the judgment of the court.

It seems very clear that the defendant is entitled to judgment on this demurrer, on the authority of *Wilson v. Knubley*, 7 Ea. R. 128; for the stat. 3 W. & M., ch. 14, sec. 15, which gives the action against the heir, though he may have aliened before action brought whatever estate he took by descent from his ancestor, only gives it in regard to debts due by the ancestor—not for the purpose of recovering unliquidated damages upon covenants, in which the heir is bound. The language of the statute is certainly limited to debts, and the courts have refused to extend it by construction; 5 N. & Man., 42; 2 Saund. 8. By a late statute in England, the remedy is given in respect to actions of covenant, as well as of debt, but we have no such law here.

And therefore, as the plaintiff in his replication relies only on the fact of the defendant having had assets before this action brought, and expressly founds his replication on the statute, he must necessarily fail.

The defendant's plea contains an useless allegation, that he had no assets by descent at any time before action brought, but that cannot relieve the plaintiff from the necessity of shewing that he had assets at the time of the action, which is denied in the plea. Both plaintiff and defendant have fallen into error in their pleading, from taking forms applicable to a different state of the law, and to a different form of action. It is of no consequence to consider whether the replication should have concluded to the country or not, as it is substantially bad.

Per Cur.—Judgment for the defendant on demurrer.

ROBERT ADAMS V. JOHN THOMAS.

To an action by indorsee of a bill against the drawer, a verbal agreement pleaded inconsistent with what the face of the bill imports.

Where a man draws a bill of exchange to pay a debt, he cannot set up as a defence to an action brought by the endorsee, that the bill was given upon a prior verbal understanding between himself and the endorsee, that the drawees would not pay unless they chose, and that in that event he was not to be liable as drawer.

Declaration: Indorsee against drawer of a bill of exchange.

Third plea: The defendant in this plea pleaded special circumstances, with a view to shew that though he did owe

the plaintiff the whole money for which the bill was drawn, yet he did not by so drawing pledge himself that the bill should be paid, but that he drew on the understanding with the plaintiff, that the drawees would not pay unless they chose, and that in that event he was not to be liable as drawer.

Demurrer to plea, as being no defence to the action.

Dempsey for the demurrer: He cited—Tyr. Pl. 325, 344, 347; 10 B. & C., 729; 1 C. M. & R., 703; 1 M. & W., 374; 3 B & Al., 233; 8 Q. B. R., 24; 6 U. C. R 396; 9 M. & W., 196; 1 M. & Gr., 791; 1 M. & W., 153.

A. Wilson contra: He cited 12 M. & W., 705; 3 M. & W., 212; 4 M. & Gr., 101; 12 Jurist, 79; 8 M. & W., 511; 4 M. & Gr., 466; 6 M. & Gr., 692.

ROBINSON C. J., delivered the judgment of the court.

The third plea, which is demurred to, is in our opinion clearly bad. It discloses a perfectly good consideration, an existing debt for work and labour, and yet pleads that there was no consideration, which is repugnant.

Also, it sets out a parol agreement or understanding existing before the bill was drawn, which is at variance with what the bill itself imports; whereas the bill being made after such verbal understanding could not be controlled by it, but must be looked upon as having put an end to any previous understanding, inconsistent with what the bill would import.

Then the plea avers that the bill was given to the plaintiff on the understanding that the drawees were not to pay, and would not pay, unless they chose, and that the defendant was not to be liable upon it.

This is not a plea that the bill was drawn purely for the plaintiff's accommodation; the defendant, I suppose, doubted whether he could safely venture upon such a plea, and he therefore pleads special circumstances, with a view to shew that though he did owe the plaintiff the whole money for which the bill was drawn, yet he did not, by so drawing, pledge himself that the bill should be paid, but drew on the understanding with the plaintiff, that the drawees would not pay unless they chose, and that in that event he was not to be liable as drawer.

If that is a good defence, then in every case where a man draws a bill to pay a debt, he could set up an understanding that he was not sure that the drawee would pay, and that it was understood that if he did not, there should be no recourse on him as drawer. If this could be allowed to be a good plea, then an indorser of a note, though he omitted to add to his name "sans recourse," might set up an understanding between him and his indorsee, that if none of the previous parties should pay, he was not to be liable.

The plea states in one part that the bill was given by the defendant to the plaintiff, upon and in respect of the work and labor *done by the plaintiff for the defendant, and upon no other account whatsoever*; and in another part, that the defendant gave the bill or order solely for the plaintiff's accommodation.

Besides this repugnancy in the statement, the bill according to the facts stated, does not come within the definition of an accommodation bill, though it cannot be supported on any other footing.—8 B. & R., 24.

Per Cur.—Judgment for plaintiff on demurrer.

MCLEOD V. EBERTS ET AL.

Where the plea was bad, and declaration bad as a whole, the defendant was not allowed from the nature of the demurrer to object to the declaration.

Where the defences were *severally* pleaded to the *several* counts of a declaration, and demurred to, and not supported, and on the argument of the demurrer an exception was taken to the whole declaration, that it was bad for a misjoinder of counts, the first and third counts being in *assumpsit*, and the second in *case*; the court, though they admitted the declaration to be bad, for the reason assigned, would not give judgment against the plaintiff; the question upon the inconsistency of the declaration as a whole having been raised under the demurrer.

In this case, the 3rd, 6th and 9th pleas, were the same defences *severally* pleaded to *several* counts. They were all demurred to, and were not attempted to be supported, being clearly bad in substance; but the defendant on the argument took exception to the declaration that it was bad for misjoinder. The 1st and 3rd counts being in *assumpsit*, and the 2nd count in *case*; and *the court* said—"We think there is the misjoinder pointed out, but that the exception cannot avail upon these pleadings, for we must look at the demurrer, without reference to the trial and verdict, and

therefore without noticing that the plaintiff has in fact recovered on all the counts. Then it stands thus: the whole declaration is not demurred to, so that the question of its consistency as a whole, is not raised. Each count is separately brought in question, on a demurrer to a plea to such count respectively, and the question on each demurrer, as regards the declaration, can only be, is the count itself good to which the plea demurred to is an answer.

**MCDONELL ET. AL., ASSIGNEES OF DONALD BETHUNE, A
BANKRUPT, V. THE BANK OF UPPER CANADA.**

Bank of Upper Canada—right to hold ships and vessels in security—to take real property in security for debt—Trover—Demand and refusal—sufficiency of proof.

The Bank of Upper Canada by their amended charter, 6 Vic. ch 27, sec. 19, are disabled from holding *ships or vessels* for any purpose whatever, whether as security for pre-existing debts, or for present advances.

Semble—that the Bank of Upper Canada may take mortgages upon *real estate*, in order to secure debts *previously* contracted.

Where the solicitor of the plaintiff went to the Bank of Upper Canada, and demanded from the president of the bank certain boats, and the president told him he had no answer to give, and referred him to the solicitor of the bank, to whom he went, and was told by him that he was not authorised to give any answer: *Held per Cur.*—that, upon these facts, sufficient evidence was given of a demand and refusal to support an action of trover.

The plaintiffs, as assignees of Mr. Bethune, a bankrupt, brought this action of trover against the Bank of Upper Canada, to recover from the bank the value of the steamers Eclipse, America, the Admiral, the Sovereign, the Traveller, and of $\frac{48}{64}$ of the steamer Princess Royal, and $\frac{16}{64}$ parts of the steamer City of Toronto.

In the first count, the plaintiffs declared on a possession by Bethune, before the bankruptcy, viz., on the 1st October, 1848, and conversion by the defendants also before the bankruptcy, viz., on the 7th November, 1848.

The second count laid the possession by Bethune before his bankruptcy, and that the steamers came into the defendants' possession on the 1st of November, 1848, before the bankruptcy, and were converted by the defendants after the bankruptcy, viz., on the 1st January, 1849.

The third count laid the possession in the assignees after the bankruptcy, viz., on the 20th of December, 1848; and conversion by the defendants afterwards, viz., on the 19th January, 1849.

Pleas 1st. Not guilty to the whole declaration.

2ndly, to the first count—That Bethune was not possessed as in that count stated.

3rdly, to first count—That the defendants by the leave and license of the said Donald Bethune, committed the grievances.

4thly, to second count—That Bethune was not possessed &c., as in that count stated.

5thly, that the steamers at the time of the conversion were not the property of the plaintiffs, as in that count stated.

6thly, to second count—Gave color by averring that the steamers being the property of the defendants on 1st November, 1848, they on that day bailed the same to Richard Roe, who delivered them to Bethune, from whom the defendant retook them.

7thly, to second count—Leave and license by Bethune, before his bankruptcy.

8thly, that the conversion was after the bankruptcy, and was by the leave and license of the defendants as assignees.

9thly, to third count—Denying that the plaintiffs were possessed as assignees as alleged.

10thly, to third count—Leave and license from plaintiffs as assignees.

Issue was joined on all the pleas.

The case was tried at the last assizes for the Home District, before Mr. Justice Sullivan.

On the part of the plaintiffs it was proved, or was admitted, that upon a summons served on the 29th September, 1848, on Mr. Bethune, calling upon him to admit a debt, (under the bankrupt law), he admitted the debt on 7th October, and upon affidavit of non-payment, made on 28th October, 1848, a commission of bankruptcy issued on the 18th November following; that on or before 28th October, 1848, Mr. Bethune was the reputed owner of the steamboats, and of the shares of steamboats sued for, which property was worth in all about 23,500*l.*; that on the 9th or 10th November, 1848, the defendants took possession of the boats Traveller, Sovereign, Eclipse, Admiral, and Princess Royal,

and that in the winter following, the plaintiffs took possession through the sheriff, but afterwards abandoned possession in February, 1849, and the defendants resumed possession of them, excepting the Sovereign and Traveller. Mr. Bethune used them, or such of them as he desired, on his own account, during the season of 1849.

On the 19th February, 1849, one of the plaintiffs went to the Bank of Upper Canada, and demanded possession of the boats from the cashier and president, during banking hours ; they declined giving any answer. This was the substance of the evidence on the plaintiffs' part.

The defendants, the Bank of Upper Canada, claimed to have a right to hold the steamers, of which they had resumed possession, and which they declined to surrender to the assignees, under certain assignments made to them by way of mortgage. It was proved that on the 27th July, 1843, Mr. Bethune made a deed, in which it was recited, that the Niagara Dock Company had built for him several steamers, viz: the America, the Admiral, and the Commerce, at a cost of nearly 25,000*l.*, that he had drawn and given bills and notes, and accepted bills to and in favor of the Niagara Dock Company, and of Wm. Cayley, who as well as the Dock Company, was a party to this deed, in order to enable the company to obtain money thereon, in liquidation of the sum which he owed to them, which notes and bills, either already given or to be given on account of the said debt, the Niagara Dock Company and Mr. Cayley were willing should be renewed from time to time, but not longer in all than the first two years without their assent : provided the banks which held them should be willing to do so, and that in order to negotiate such notes and bills by way of discount, it had been and continued to be necessary for the Niagara Dock Company, and for Mr. Cayley, or one or other of them, to become parties to the same : and that Mr. Bethune had agreed with the Niagara Dock Company, and with Mr. Cayley, to secure and indemnify them for the liability which they had assumed. And the deed then declared, that in consideration of the premises, and of ten shillings by the Niagara Dock Company, and by Mr. Cayley paid to

Bethune, he did thereby bargain, sell, assign, transfer and set over to the Niagara Dock Company and to Mr. Cayley, and their assigns, the steamers America, Admiral, and Commerce, with their engines, rigging, &c., to hold to the Company and Mr. Cayley, and their assigns, and to the executors or administrators of Cayley, with a proviso that if Bethune, his heirs, executors, &c., "should pay all such sums of money as shall from time to time become due for or on account of such notes, bills, acceptances, and other negotiable paper, made or to be made in manner and for the purpose thereinbefore expressed, until the cost of the said three steamers shall be fully paid to the said Niagara Dock Company, and if the said Bethune, his executors, &c., shall at all times save harmless and indemnify the said Niagara Dock Company and the said W. Cayley, and each of them, and his and their estates, effects, &c., against all suits, demands, losses, &c., which shall at any time hereafter in law, or in equity, be had or made against the Niagara Dock Company and the said William Cayley, or either of them, or which their, or either of their estate or effects shall or may pay, bear, sustain, incur, or be put unto for or by reason or on account of the said Niagara Dock Company and the said Mr. Cayley, or either of them, indorsing, accepting, or otherwise becoming parties to, or responsible for the payment of all or of any such notes, bills, acceptances, or other negotiable paper as aforesaid, or for or by reason, or on account of any other matter or thing concerning the premises, or in anywise relating thereto, then the deed should be void."

Mr. Bethune also by this deed covenanted that he would pay all such sums of money, and fulfil all such conditions as were stated in this proviso; that he had good right to sell and assign the said steamers, as intended by the deed; that in case of any default on his part it should be lawful for the Niagara Dock Company and W. Cayley, to take possession of the steamers and enjoy them for their own use, free from all former and other sales, debts, mortgages, debts and incumbrances whatsoever, and that he the said Bethune should to that end, make all such other assurances in their favour as might be required.

Then Mr. Bethune stipulated that he would keep the steamers insured against loss by the perils of navigation, or by fire, and in the event of his neglecting to do so, then the Niagara Dock Company & W. Cayley might keep them insured at certain values specified, and the monies they might expend for that purpose, should constitute a charge upon the steamers, which should not be redeemable without repayment thereof; that if Bethune should be in default to the amount of 5000*l.*, or if the company or the said Wm. Cayley, should be called upon for the same, or if Bethune should not perform all the conditions in the proviso, then it should be lawful for the *Company and W. Cayley, and their assigns*, absolutely to sell and dispose of the said steamers or any of them, as might be sufficient to produce the amount so in default, by auction or by private contract, as they might think fit, and to enter into and make all such contracts and deeds as they should think proper for such purpose, which should be binding without Bethune being a party or assenting thereto; that they should hold the purchase money in trust, to pay—first, all charges attending the trust; next, to retain for themselves all monies due to them or either of them, by virtue of the proviso above recited; and then to pay the surplus, if any, to Bethune.

Bethune, by the deed was to remain in possession of the steamers, and to take all the profits thereof to his own use, until default made in the proviso contained in the deed.

This deed was executed by Bethune and by Mr. Cayley, and by the Niagara Dock Company, under the seal and signature of their President.

On the 13th August 1843, a deed was executed by the Niagara Dock Company and by Bethune, in which it was recited that W. Cayley had become a party to, and was responsible for the payment of certain bills, notes, or other negotiable paper, in pursuance of the deed of the 27th of July, 1843, (to which this latter deed was annexed,) or of the purposes therein set forth, and that he had agreed in like manner, from time to time, to draw, accept, indorse, or otherwise become party to, or responsible for the payment of other bills, promissory notes or negotiable paper, in con-

formity with the annexed deed, and according to the true intent and meaning thereof and of the parties thereto. And that he *had become and had agreed to become further responsible* as aforesaid, for the benefit and convenience of the said Niagara Dock Company, and that the said company had agreed with the consent of Bethune, testified by his execution of this latter deed, to assign all their interest in the annexed mortgage to the said W. Cayley, as a security against loss by reason of the premises. And by this deed, the Niagara Dock Company, in consideration of the premises, and in further consideration of ten shillings, did bargain, sell and assign to W. Cayley, the said annexed mortgage, and the steamboats therein mentioned, and all their right to the said steamboats, &c.; with a proviso that if the said Niagara Dock Company should indemnify and save harmless the said W. Cayley from all actions, payments, damages and losses, by reason of his having become liable, as recited in this deed, or of his having become, or thereafter becoming party to, or responsible for the payment of any bills, notes, &c., in pursuance of, and in conformity with the stipulations of the annexed mortgage, (that of 27th July, 1843) then this assignment should be void.

And the Niagara Dock Company, in this deed, covenanted to save W. Cayley harmless from all actions, charges, payments, losses and damages, arising or to arise by reason of anything in any manner in the foregoing proviso contained and set forth. This deed was not executed by W. Cayley.

On the 23rd of October, 1845, W. Cayley executed a letter of attorney, empowering Clarke Gamble, Esq., to execute an assignment, in his name, to the Bank of Upper Canada, of the mortgage of 27th July, 1843, and also the deed of 13th August, 1843, by which that mortgage was assigned to him, W. Cayley. And this letter of attorney further stated that, "whereas the promissory notes in the said mortgage and assignment mentioned, and the renewals thereof, were from time to time held by the Bank of Upper Canada, who had cashed the same; the said assignment of the said mortgage and assignment are for the purpose of

securing to the Bank of Upper Canada the payment of the said promissory notes, and the renewals thereof, which is the consideration for the said assignment to the said Bank of Upper Canada."

On the 1st December, 1845, W. Cayley, by his attorney (Mr. Gamble), made a deed, reciting that the greater part of the bills, notes, &c., in the said mortgage and assignment mentioned, had been negotiated with the Bank of Upper Canada, where the same had been renewed from time to time, and where the same were still outstanding to be renewed from time to time, upon payment to be made to Mr. Bethune; that the Bank had requested W. Cayley to assign the mortgage to them, for their security, which he had agreed to do until all the said notes, bills, acceptances and other paper negotiated by the said Niagara Dock Company and the said W. Cayley, with the Bank of Upper Canada, and which the mortgage was given to secure should be paid and satisfied; and then the assignment to be void, and the said indenture to revert back to the said W. Cayley, to enure for his benefit and security, on account of other liabilities of his for the said Bethune.

And by this deed W. Cayley, in consideration of what was recited, and of 5s. paid to him, "bargained, sold and assigned to the Bank of Upper Canada the indenture of mortgage and assignment, and the steamboats therein mentioned, and all his interest therein, to hold to the said Bank of Upper Canada, to and for their own absolute use and benefit;" with a proviso that if Bethune or the Niagara Dock Company or W. Cayley should pay all the said bills, notes, acceptances, &c., negotiated with the Bank of Upper Canada, or held by them in pursuance of and in conformity with the stipulations contained in the said mortgage, and according to the true intent and meaning thereof, and of this deed (of 1st December, 1845), then this assignment should be void, and the indenture of mortgage should revert back to W. Cayley, "*and enure to his benefit, as intended by the assignment thereof to him,*" and that he could and might claim thereunder at law or in equity, as if this last deed had never been executed.

On the 13th of May, 1846, W. Cayley, by deed, reciting the assignment which Mr. Gamble had made in his name to the Bank of Upper Canada, confirmed the same.

On the 20th of May, 1847, an indenture, made between Bethune and the Bank of Upper Canada, was executed by Bethune, in which it was recited that Bethune was then indebted to the Bank, on promissory notes, bills of exchange and other negotiable paper, discounted and negotiated by the Bank for his accommodation; and that in order to secure the same, he had agreed to convey to the Bank the steamers *Princess Royal*, *City of Toronto*, the *America*, the *Admiral*, and the *Eclipse*, with the engines, rigging, &c., subject to the conditions therein expressed.

And this deed then recited, that by a certificate, dated 21st January, 1846, signed by the collector of customs for the port of Toronto, it was certified that the said D. Bethune "having with Andrew Heron and Thomas Dick made and subscribed the declaration required by the statute, and having declared that he was owner of forty-eight shares of the ship or vessel called the *Princess Royal* of Toronto, which is of the burden 347 tons, and whereof William Colcleugh then was master; and that the said ship was built by the Niagara Harbour and Dock Company, at Niagara, in the year 1841; and the subscribing owners having consented and agreed to the description thereinbefore given, that their ownership and property in the said ship or vessel has been duly registered at the port of Toronto."

It recited also, another certificate of the same date, signed by the same collector, that Donald Bethune had declared himself owner of sixteen sixty-fourths of the ship or vessel called the *City of Toronto* of Toronto, of the burthen of 344 tons, whereof Thomas Dick was master, built by the Niagara Harbour and Dock Company, at Kingston, in 1840.

And another certificate, dated 4th May, 1846, of the same collector, that Donald Bethune was sole owner of the ship or vessel called the *America* of Toronto, of the burthen of 221 tons, whereof Robert Kerr was master, built at Niagara by the Niagara Harbour and Dock Company, in 1841.

And another certificate, of the same date as the last, by the same collector, of Donald Bethune being sole owner of the ship or vessel called the Admiral of Toronto, of 228 tons burthen, whereof William Gordon was then master, built by the Niagara Harbour and Dock Company, at Niagara, in 1842.

And another certificate, dated and signed as the last, that Donald Bethune was the sole owner of the ship or vessel called the Eclipse of Toronto, of the burthen of 198 tons, whereof John Gordon was master, built at Niagara in the year 1842.

And then this deed declared, that in consideration of the premises, and of 10s. paid to him, Bethune thereby bargained, sold, transferred and conveyed to the Bank of Upper Canada these several steamboats and parts or shares of steamboats mentioned and described in the recited certificates of ownership, and all his right thereto, to hold to the said Bank; with a promise, "that if Bethune shall pay all such sums of money as shall from time to time become due and payable for, upon or by reason or on account of all and every such notes, bills, &c., made in manner and for the purpose thereinbefore expressed and declared, *or to be* made from time to time, to renew or retire the said notes, bills, &c., so discounted and negotiated as aforesaid, then this deed shall be void."

Bethune covenanted that he "would pay all such sums of money as should become payable in manner and form in the above proviso mentioned, according to the intent of this deed and of the said proviso; and that he had then good right to convey the said property; and that if default should be made in paying any sum of money, to become payable as aforesaid, then the Bank might take possession of and hold the said steamers: and that in case of default in performing any condition of this proviso, Bethune should make any further assurance for the more perfectly and absolutely assigning the said vessels to the Bank, which they might require."

This deed contained also such stipulations in regard to insurance, as were in the first mortgage to the Niagara

Dock Company and Mr. Cayley, the insurance to be on the value of 15,000*l.*; and the usual stipulations that until default, Bethune might remain in possession of the boats, &c., taking the profits to his own use.

On the 12th of January, 1846, Bethune had made a mortgage to the Commercial Bank of the Midland District, reciting that he had an open credit with them for 13,000*l.* upon personal security given to them that he would pay the same at the end of every six months during the continuance of the said credit; and that he desired to give them further *security for the payment of the said 13,000*l.*, or whatever sum might from time to time be due by him to the said Bank upon the said credit:* and he thereby granted, sold and assigned to the said Commercial Bank forty-eight sixty-fourths of the steamer Princess Royal, and sixteen sixty-fourths of the steamer City of Toronto, with a proviso that if he should pay to the said Bank the said 13,000*l.*, or such other sum as might be due to them at the close of the said credit, then the assignment to be void. Until default, Bethune to continue in possession, and receive the profits to his own use.

On the 8th June, 1848, the Commercial Bank, by deed under their seal, in consideration of 5*l.*, assigned this mortgage to the Bank of Upper Canada.

On the 19th of February, 1848, Bethune executed an indenture between himself and the Bank of Upper Canada, whereby, in consideration of 9000*l.* due to the said Bank, and of 5*s.* paid to him, he bargained, sold and assigned to the Bank two steam-propellers, called the Scotland and the England, and also the steamer Sovereign, "described in certificate of ownership number 5, for the year 1845, granted to him (Bethune) by the Collector of Customs for the port of Toronto—of which steamer Sovereign he (D. Bethune) was sole owner, and which said steamer is stated in the said certificate of ownership as of the burthen of 344 $\frac{986}{3500}$ tons gross, and whereof James Sutherland was then master; and that she was built by the Niagara Harbour and Dock Company, in the year 1838:" and also the steamer Traveller, described in certificate of ownership number 1,

for the year 1848, granted by, &c., to the said D. Bethune, and of which the said "D. Bethune is sole owner; and which said steamer Traveller is stated in the certificate of ownership as of the burthen of $218\frac{1450}{3500}$ gross, and whereof Archibald McDonald is master; and that she was built by the Niagara Harbour and Dock Company in the year 1834:" to hold all the said steamers to the Bank of Upper Canada, subject to the condition, that if the said Bethune should pay to the said Bank the said 9000*l.*, and legal interest thereon, on the 17th Augnst, 1849, then the obligation to be void—otherwise, to remain in full force."

Mr. Bethune covenanted to pay the 9000*l.* to the Bank, and he was to be allowed to continue in possession until default made.

The certificate of ownership of the City of Toronto granted by the collector was put in evidence upon the trial, and it contained all the specifications which the Ship Registry Act required, stating, besides the tonnage, that the said ship or vessel had one deck and three masts—her length from the inner part of the main stern to the fore part of the stern post—her breadth at midships—her depth of hold—that she was propelled by steam—dimensions and tonnage of the engine room—that she was schooner-rigged, with standing bowsprit, square stern, carvel built—had no galleries, and had an Indian Chief figure-head.

Upon this certificate of ownership, a minute of the various mortgages given by Bethune on his interest in the said steamer City of Toronto, was endorsed by the collector.

Admitted copies of the certificate of ownership of the other steamers were also put in, which contained all the specifications required by the statute, and on which were entered a minute, as required by the same act, of the several mortgages given by Mr. Bethune.

Upon this being shewn by the defendants, the plaintiffs, besides denying that in this province any corporation aggregate can legally hold property in a ship, contended that the defendants, the Bank of Upper Canada, were especially disabled from doing so by the 19th clause of their present charter, the provincial statute 6 Vic. ch. 27, which provides

that the Bank shall not either directly or indirectly hold any lands or tenements, except such as they are by the act authorised to hold for the convenient management of their business, or any ships or other vessels, or any share or shares of the capital stock of the corporation, or of any bank in this province; nor shall the said corporation, either directly or indirectly, lend money or make advances upon the security, mortgage or hypothecation of any lands or tenements, or of any ships or other vessels, nor upon the security or pledge of any share or shares of the capital stock of the corporation, or of any goods, wares or merchandize; nor shall the said corporation, either directly or indirectly, raise loans of money or deal in the buying, selling or bartering of goods, wares or merchandize, or engage or be engaged in any trade whatever, except as dealers in gold and silver, bullion, bills of exchange, discounting of promissory notes and negotiable securities, and in such trade generally as appertains to the business of banking: "Provided always, that the said corporation may take and hold *mortgages and hypothèques on real estate and property in this province, by way of additional security for debts contracted to the corporation in the course of their dealings.*"

The defendants, on the other hand, maintained that the proviso at the end of this clause expressly authorised them to take mortgages on ships, as coming within the word "*property*," by way of additional security for debts contracted with them in the course of their dealings. This was denied by the plaintiffs, who contended farther, that even if the Bank could, under that proviso, hold a property in ships mortgaged to them, in order to secure debts previously contracted, yet it was clear they were not allowed to lend money or make advances upon such security. This was the principal point discussed in the case; and with the view of invalidating the mortgages as being taken to secure prospective advances, or advances made expressly in contemplation of that particular security, the plaintiffs endeavored at the trial to make it appear that this was in fact the nature of the transactions between the Bank and Mr. Bethune.

The cashier of the Bank was examined, and swore that when the second mortgage was taken, Bethune owed the Bank fully 30,000*l.* on ordinary banking paper, and that they took that mortgage of 20th May 1847, as collateral security; that the Bank being uneasy asked for it; and that the debt secured by it had not been reduced since; that the last mortgage, that for 9,000*l.*, was given in consequence of an indorser of Bethune's being in precarious health, and his property embarrassed. He declared that when the Bank took possession in November 1848, he had heard of the executions, but not of any act of bankruptcy, and that Mr. Bethune was fully assenting to their taking possession. He swore further, that at the time of the trial Mr. Bethune owed the Bank over 30,000*l.* on banking paper—some of which was yet in the Bank, and some in the course of collection—that is, in the attorney's hands; that the Bank had become possessed of notes of Bethune's, taken from the Niagara Dock Company, and that the company and Mr. Cayley assigned Bethune's mortgage to them as collateral security. He could not state then from memory what amount was due by Bethune in 1845; his debt to the Dock Company was gradually reduced, but a large sum remained due, when Bethune failed, upon notes which had been renewed from time to time until some time before his bankruptcy, when he owed the Bank still several thousand pounds on the assignment of the mortgage, independent of his transactions with the Niagara Dock Company; that the debt increased afterwards, and that the mortgage of 20th May 1847, was taken when he was actually indebted to the Bank in upwards of 30,000*l.*; that he could not say that an account had been taken of the precise sum due when the mortgage was taken in May 1847, but that the property mortgaged was well known not to be sufficient to cover it all, including the debt still due on his notes, &c. taken by the Bank from the Niagara Dock Company, which amount had by that time been reduced, though he could not say without examination to what amount; part of that debt was paid off in 1847, after the mortgage of May in that year was taken; but more than 3,000*l.* was still due

on account of it. In December, 1845, when the mortgage given to the Niagara Dock Company was assigned to the bank, the company owed the bank in all 14,0000*l.* and upwards, including other debts not covered by that mortgage. After May 1847, notes were renewed for Bethune from time to time, till last year—some of the notes perhaps being allowed to lie without renewal. He stated that Mr. Smith had accepted for Bethune in favour of the bank for 16,000*l.*, and it was to secure that the mortgage of February 1848 was given; the 9000*l.* mentioned in it being the supposed value of the boats, and the 16,000*l.* acceptance being given to cover all or most of Mr. Smith's indorsements for Bethune, but he was not positive whether that acceptance was given before or after the mortgage of February 1848.

The cashier swore expressly that the new bills and notes were not discounted on the faith of the mortgages, but upon good names being upon the paper; "they were fresh transactions or perhaps discounted to raise funds to pay off others falling due, or to renew them; and that he could not then distinguish such part of the debt from any other." The mortgages, he said, were of some assistance in gaining time for Bethune in old transactions. The paper was commonly at 90 days; and if it had not been for the mortgages, Mr. Bethune would not have been allowed to renew his paper with doubtful names on it.

He said he could possibly by examination of the books and notes, ascertain the exact amount of Bethune's debt at any given period: that Bethune was at one time indebted to the Commercial Bank on execution, and to save the boats, the Bank of Upper Canada paid 2700*l.* in the spring of 1848, taking an assignment of the judgment; no time was agreed to be given, and Mr. Bethune was no party to the arrangement. This debt had been secured to the Commercial Bank by mortgage on the Princess Royal and Admiral, made in 1846, and the Bank of Upper Canada paid it to get rid of the incumbrance before they took the mortgage of May 1847.

Some of the notes were overdue when the bankruptcy took place; perhaps half of them. The cashier stated that

the bank did not understand that Bethune was largely indebted to others, and that he was not aware in the summer of 1848 that he had been summoned, with a view to bankruptcy. The mortgage of May 1847, he said, was delayed being registered till 1848, by omission of the solicitor. The acceptance of Mr. Smith for 16,000*l.* seems to have been given in March 1848, and would be due in June. It was probably a renewal—the money was never paid. A good deal of Mr. Bethune's paper then fell in arrear and was not renewed, as the cashier thought. He stated that no regular account was taken at the time of receiving any of the securities, of the precise amount due, though it was well known when the mortgage of 1847 was taken that a good many thousand pounds of the Niagara Dock Company debt was paid off after May 1847, but Bethune's general indebtedness remained fully as large as it was then.

He stated that after the mortgage of 1847, the bank would have discounted the notes with new (good) names upon them without reference to the old debt. He repeated that none of the mortgages were taken for the purpose of making advances upon them, and that there were continually notes of Bethune's past due in 1847, and in February 1848. This evidence being given on the part of the defendants, it was objected by Mr. Galt for the plaintiffs that the securities were void, the bank not being legally capable of taking such mortgages, and he referred to the statute 6 Vic. ch. 27, secs. 1, 19, and 27.

2ndly. That no corporation aggregate could be the owner of a vessel, and he referred to 2 & 3 Vic., 6th sec. and to 8 Vic. ch. 25.

3rdly. That a mere mortgage title to a vessel was at any rate no defence in an action of trover.

4thly. That when the bank took actual possession, then the vessels became pledges in their hands, and as pawnees they would be liable in trover if they used them and subjected them to risk, and that they could not consistently with their charter hold pledges in possession.

5thly. That the bank charter, if it authorised a mortgage on a ship to be held by them in any case, did so only in

case of its being taken as additional security for a previously existing debt, and did not allow any mortgage of the kind to be taken by them as a continuing security for a floating liability in respect of notes to be afterwards given.

Mr. Cameron, also on the part of the plaintiffs, contended that the mortgage of May 1847, not being registered till *July* 1848, could only operate as an assignment when so registered; and taken with reference to that date, it would be void, as being given for the purpose of a fraudulent preference.

The learned judge for the time overruled all these exceptions; he held it sufficient that that mortgage was registered before the commission of bankruptcy issued, and that there was no ground for saying that there was a fraudulent preference.

The plaintiffs then put in several summonses which had been served on Mr. Bethune, under the bankrupt act, between 2nd April 1848, and 5th September, in order to shew that he was in difficulty, and to lay the foundation for inferring a preference.

Mr. Bethune was called as a witness, and swore that the debts in respect to which he had been thus summoned were all paid, and that he never contemplated going into bankruptcy until the day the commission issued; that the creditors were on that day agreed not to urge it—but one creditor, against the wish of the others, persisted.

He stated that the mortgage of May 1847 continued unregistered only because Capt. Dick was absent in England, and had the certificate of ownership of the shares in the City of Toronto; and, wanting this, the collector would not register the mortgage for the other vessels; that it was registered as soon as possible; that he paid the debts for which he had been summoned, at the latest moment; that notes of his continued dishonored in July 1848,—the acceptance of Mr. Smith fell due in June, and was still unpaid; that after that his paper began to accumulate, that he renewed notes during the whole summer, and was embarrassed with notes falling due in other banks; that when he gave the mortgage in May 1847, he wished to secure the debt due to

the Bank, and to secure the indorsers; that he hoped the Bank would look to the boats first; that he had paid many thousand pounds to the Bank, and drew out a good deal for various purposes; that his paper was renewed frequently, and sometimes with the same names, sometimes with new names; that his whole account was kept with the Bank of Upper Canada, and he drew on it for all requisite purposes; that there were some new discounts in 1848, and that a large balance of the old debt was still due.

It was then contended, on the part of the plaintiffs, that the mortgage made in February 1848, on the Sovereign and Traveller, was not due till August 1849, and that the plaintiffs had a right to recover damages for a conversion of them, by their detention till that time; but the learned judge considered that Mr. Bethune was shewn to have consented to the defendants' possession up to the time of his bankruptcy, and that the pleas of leave and license by him were sustained, and there was no detention or conversion of those two vessels afterwards by the defendants. He considered also upon the main question, that there was an original debt due when the mortgages were given, which identical debt continued to be due, though renewal notes were given afterwards from time to time on account of it; that although the notes, or some of them, were current when the mortgages were taken, yet the mortgages were not on that account otherwise than additional securities for a pre-existing debt, and were not continuing securities for new and prospective advances.

Upon the objection that the mortgage of May 1847 was not registered, and so not an effectual assignment till 1848, and that it became, when then given, an act of voluntary preference in contemplation of bankruptcy, he considered that there was no question of voluntariness about that security, nothing voluntary in the assignment, and nothing fraudulent in the transaction—and that the registry being before the commission of bankruptcy, made the transfer perfect, so as to free it from any such exception.

He left, however, the questions of voluntariness and fraudulent preference as questions of fact for the jury, telling

them that there were no acts of bankruptcy proved before July 1848, when this mortgage was registered. He was of opinion that there was no proof to go to the jury in support of the pleas of leave and license granted by the plaintiffs, the assignees.

On this charge the jury gave their verdict for the defendants.

Cameron, Q. C., obtained a rule for a new trial on the law and evidence, and for misdirection.

Sherwood, Q. C., and *Vankoughnet* shewed cause—they cited the following authorities—6 Vic. ch. 27, sec. 19; 4 Bing. 45; 2 C. & J. 529; 2 Tyr. 603; 11 Jurist, 279; 16 L. J. Q. B. 50; 5 Jurist, 773; 2 M. & Rob. 552; 9 Bing. 14; 1 Mont. 263; 2 Dea. 1; 3 Mon. & De Gex, 125; 7 Taunt. 409; 2 Wil. 169; 1 M. D. De Gex, 3, 146 & 350; 2 Dea. 219; 2 Y. & Coll. 354; 6 B. & C. 512; 9 A. & E. 720; Shelford on Mortmain, 8, 10; Plowden, 502; Co. Lit. 2 (b); 12 Ea. R. 96; 5 B. & C. 587 (note); Bac. Abr. Corp. C.; 2 Dougl. 697; Cowper, 792; 8 Ea. R. 383; 1 T. R. 153; 2 A. & E. 12; 1 M. & S. 500; 6 M. & S. 290; 7 Q. B. R. 491; 1 C. & K. 449; 7 Jurist, 981; 5 Q. B. R. 153; 12 M. & W. 403.

Cameron, Q. C., *Burns*, *Hagarty* and *Galt*, cited in support of the rule—the several Bank Charters, 1822, 1842; 5 Bing. N. C. 530; 4 M. G. & Scott, 122; 13 Jurist, 845; 6 Vez. 745; 15 Vez. 60; 1 Atk. 166; 2 Vez. jr. 378; 5 Com. B. R. 886; 4 C. B. R. 121; 13 Jurist, 845. On the meaning of the word *hypothèque* was cited—*Coutume de Paris*, art. 170; *Domat on Civil Law*, book 3, title 1; *Toulier & Troplong's Com. on Code Civile*, vol. 19, p. 16, secs. 394-5-6, vol. 18, p. 129, sec. 100; *Dard's Instruction*, tit. 9; *Paty's Treatise on the Courts of Commercial and Maritime Law*, vol. 1, p. 108.

ROBINSON, C. J.—This cause was tried at Toronto in the autumn of 1849.

The rule nisi was moved and granted in Michaelmas Term last, and after the return of the rule the case was argued on the last two days of that term, before the court as then constituted, consisting of myself and my brothers Macaulay, McLean and Sullivan.

Before the next term, it happened that such appointments were made, under the new act for establishing the new Court of Common Pleas, as removed from this court all my brother judges who were present with me at the argu-

ment—but as they had considered the case in the interval, and had made up their minds upon it while they were still judges of this court, and as I had also formed my own opinion, I should have given judgment in the last term, without suggesting as I did a second argument, if I could have said that the late judges of this court, who had heard the argument, all concurred in the opinion which I was prepared to pronounce; but as there was a difference of opinion among my brother judges upon the main point in the case, and as the judgment which I should have given must, under the circumstances, have been in point of form at least, and I apprehend also in legal effect, the judgment of myself alone, I suggested that it might be more satisfactory to the parties, considering the large amount of property involved, to have a second argument before this court as at present constituted. It was, in consequence of this suggestion, a second time argued in the last term; and I regret that such second argument could not give the parties the advantage of the judgment of the three judges now comprising this court, from the circumstance that Mr. Justice Burns having been counsel in the cause while at the bar, declines of course to take part in the judgment.

Mr. Justice Draper, however, has considered the case maturely, and the conclusion which we have both come to is in accordance with the opinions which two of the other three judges who heard the first argument with me, had formed upon the case.

The property in dispute is worth many thousand pounds; it is in its nature perishable, and requires large outlays constantly to be made upon it, which makes it desirable that the court should determine without unnecessary delay who can legally claim the present interest in it. We have on this account, with the consent of parties, gone somewhat out of the regular course in delivering our judgment in vacation.

The verdict was rendered for the defendants in consequence of the view taken by the learned judge of the validity of the defendants' title; he considered that they had a right under the assurances which they hold, to detain from the assignees of Mr. Bethune all the boats for which the

assignees are suing. Before determining whether that opinion of the defendants' title was correct or not, we are to consider whether the plaintiffs at the conclusion of their case made out a good *prima facie* claim to recover damages in respect of any part of the property, because unless they did, it would be idle to examine into the validity of the defendants' title, and unnecessary to grant a new trial on account of any view which we might take of the questions raised upon it.

On the other hand, if the plaintiffs shewed upon their evidence a good right to possession of *any part of this property*, and if the defendants have wrongfully converted or detained such part of the property from them, then there should be a new trial, whatever may be the merits of the case as to the remaining portion of the property; because the verdict is general, and denies the plaintiffs' right to recover in respect of any of the boats claimed, or any interest in either of them.

It was shewn that Mr. Bethune was the registered owner of all the property in question, on or before 28th October 1848. No act of bankruptcy was shewn to have been committed by him before that day, when he did commit an act of bankruptcy by making default in paying or securing a debt for which he had been summoned according to the bankrupt act, and a commission issued against him in consequence on 18th November 1848.

After reading the evidence of Mr. Holland, Mr. Goldsmith and the sheriff, it is impossible to say that the plaintiff did not give evidence of such possession, and dealing with some part of this property by the defendants after the bankruptcy and *after the commission issuing*, as would give the assignees a good right of action in case the defendants could shew no legal claim to the possession. Any leave or license given by Mr. Bethune before his bankruptcy, could at least afford no defence as to anything done by the defendants after the date of the commission.

If there had been no evidence of detention after demand and refusal, and the plaintiff's case had rested wholly on proof of the defendant's actual use and conversion of the

property after it had got into their possession, then it would be necessary in order to arrive at a proper estimate of damages, to compare and consider the evidence carefully in respect to the different boats ; and there seems to be a contradiction between the evidence of Mr. Holland and Mr. Goldsmith in regard to the Sovereign and Traveller ; but we need not on this occasion go into any examination of that kind, because the plaintiffs have not recovered for any part of the property ; and therefore, if they had a right to a verdict in respect to any portion, it is right they should have a new trial ; and upon such new trial, the evidence as it respects the several boats would all come again to be considered with any additional evidence that might be given, and it would be better that it should then receive consideration without prejudice from any opinions unnecessarily expressed upon such details at present.

Then, besides the evidence given, in order to prove an actual conversion by intermeddling with the property, the plaintiffs gave evidence by Mr. Duggan of what they relied upon as a legal demand and refusal. It was objected that the evidence was insufficient, but the learned judge did not direct the jury in favor of the defendants upon any such ground, but upon the strength of the defendants' title ; for he thought that the demand and refusal proved were sufficient, and we agree in that opinion.

Mr. Duggan swore, that on 19th February 1849, he went to the Bank of Upper Canada and formally demanded possession of the boats, the sheriff having about the 30th January before resigned to the bank the possession which he had taken on behalf of the assignees, when he put the agent for the bank out of possession. The president told Mr. Duggan he had no answer to give, and referred him to the bank solicitor. Mr. Duggan then went to the solicitor and made a similar demand of him ; and he stated that he was not authorised to give any answer. Directly after this the present action was brought.

I think that, with regard to a trading corporation as this is, and conducting, as it is well known such corporations do, their general business in a great measure through the

president and corporation, the corporation is sufficiently represented by those officers to make their acts binding upon them in the ordinary transaction of business, and at least when such acts have not, after the lapse of a reasonable time, been repudiated. He referred to the solicitor, and his refusal to take any step made his refusal their refusal. It shewed that they would not give up the boats unless their solicitor advised it, and he did not advise it. We must assume that the corporation in due time knew of this demand that had been made upon their officers, and if they were willing to give up the property, they would have given proof of their willingness to do so, by passing a resolution to that effect and giving the necessary directions; and if they desired to take that course they would not have thought it unimportant to act promptly, from the circumstance of the plaintiffs having in the meantime, and without any delay, brought their action. But it was evident from all that occurred after the demand made at the bank upon the president, that the bank were resolved not to give up the boats, and adopted and approved of the conduct of their officers in declining to comply with the demand, for they went on, according to the evidence of Mr. Holland and Mr. Goldsmith, through the following season, in managing the boats or some of them, through their agents, and receiving their earnings; and they have resisted this action and stood upon their right of property; all which shews an intention to detain and an actual detention after the demand, and so makes it proper, I think, to treat the declining by their officers to give up the boats when formally demanded as their own act, if there were otherwise any doubt upon the propriety of considering it binding upon them. I think therefore, the plaintiffs made out a claim to recover for some damages, unless the defendants were able to disprove their title to the property.

Upon this part of the case there is no difference between the opinion which we hold and that which was expressed by the learned judge at the trial, whatever ground there might be in estimating upon the evidence the plaintiffs claim to greater or less damages, (which is not now the

point), to draw distinctions as to the defendants' liability in regard to the different boats. The case went to the jury with a direction in favour of the defendants, upon the broad ground that the right to the possession was in the defendants, as to all the property which they were shewn to have used or detained.

As to any objection to the assignments made to the defendants as being void under the bankrupt law, because given for the purpose of an illegal preference, there could be no such objection as regards the *America* and *Admiral*, which came to the bank in 1845, by assignment from Mr. Cayley. As regarded the further mortgage of May 1847, by Mr. Bethune of the same two boats, and the mortgage by the same instrument of the *Princess Royal*, *City of Toronto*, and *Eclipse*—assuming that we can only look on this assignment as being made on the day that it was registered, as directed by the ship registry act—namely, on 18th July 1848 (*a*), which the learned judge at the trial did not deny, though he perhaps thought that point admitted of doubt—still it was a question for the jury whether there was evidence that could warrant them in saying, that in July 1848, Mr. Bethune contemplated bankruptcy, and gave this assignment by way of fraudulent preference. That question was submitted by the learned judge to the jury, and they decided it in favour of the defendants, and not improperly, I think, for the tendency of the evidence is to show that Mr. Bethune desired and hoped to avoid bankruptcy at and after that period, and to avoid it by means of the bank continuing their liberal confidence in him in consequence of the security which he had given. Independently of the effect of the 24th clause of the 8th Vic. ch. 5, there was nothing in the evidence, I think, that could be relied on for impeaching the assignment to the bank on the ground of illegal preference.

It was on the other ground that the case was principally contested at the trial, and in the arguments in term—namely, that independently of any question upon the bankrupt laws, the bank could not legally take these assignments—

(a) 4 Com. B. 122.

1st. Because as a corporation aggregate, and without reference to any particular provision contained in their own charter, they are not legally competent to hold either an absolute or qualified property in ships.

2nd. Because by their charter as amended, 6 Vic. ch. 27, sec. 19, the defendants are disabled from holding ships either in absolute property or as mortgagees; and as to this second point of the defendants being disabled by their charter to hold ships, the plaintiffs deny that the 19th clause allows them to take security upon ships even for debts previously due, any more than to advance money upon such security in the first instance.

The defendants on the other hand, as to this question, under the 19th clause, contend that under the proviso at the end of that clause they can legally take mortgages on ships by way of additional security for debts previously contracted with them in the course of their dealings, and they maintained that all the assignments produced in this case were made by way of additional security for debts previously contracted; and so come within that proviso.

The plaintiffs, while they denied that such assignments would be legal under the 19th clause, if the fact were so, denied also that these assignments could upon the evidence be properly regarded as being wholly by way of additional security for pre-existing debts.

It was to this question of facts that the greater portion of the evidence given at the trial related, and the discussion of that evidence and the effect of it formed a principal point in the arguments in banc.

If we were of opinion that the exception in the proviso at the end of the 19th clause extended to mortgages upon ships, then it would be necessary for us to consider very carefully whether the evidence did or did not shew all the assignments in question, or any and which of them, to be given wholly by way of security for pre-existing debts, or whether some one or more of them was not either wholly or to some extent to be regarded as given to cover advances which should be considered as being made at the time of taking the mortgage, or which were intended to be afterwards made upon the security of such mortgage.

So far as I have considered the evidence bearing on this point, I incline to think it was altogether not so clear as appeared to be thought at the trial by the learned judge, that the defendants could be properly said to have taken and to be holding all these mortgages only as securities for debts which were due to them, before each mortgage was respectively taken. If any portion of the debt now due by Mr. Bethune, and claimed to be secured by either of these mortgages, could with truth be found by the jury to have consisted of money directly or indirectly advanced upon the security of that mortgage, then, as to such portion of the debt due, the mortgage would not be an available security for covering it, though it might (supposing that mortgages on ships come under the proviso at the end of the 19th clause) be effectually relied upon, nevertheless, for securing the debt due before it was given, if it had in the first instance been *bona fide* given, only with a view to secure such pre-existing debt.

I think that in such cases the evidence would often present a question which must be submitted to the jury to determine, and my impression is, that if these had been mortgages on real estate, and so coming clearly under the exception at the end of the 19th clause, instead of mortgages on ships, the case would have been one which, as to some portions of the money due by Mr. Bethune, it would have been necessary to submit, with proper explanations, to the jury for their decision upon this point.

But if the view which we take of the other legal questions raised in this case were such as to make it necessary to determine whether the several mortgages, as to their whole amount, stood free from any question as to their being taken and held only as security for debts contracted before they were executed, then I should desire to consider that point more particularly.

At present I make no further remark on that portion of the case, because in the view which I take of the effect of the 19th clause, it is of no consequence to consider it. Applying ourselves then to the question already stated—namely,

1st, Whether independently of anything particular in the defendants' charter, they are incapable, as being a corporation aggregate, to hold ships; and

2nd, Whether if this be not so, they are not still disabled from holding ships, either as absolute purchasers or mortgagees, by the particular provisions of their charter, 6 Vic. ch. 27. It will be most convenient to consider the latter of these questions first.

The 19th clause of 6 Vic. ch. 27, on which the question turns, has been already stated by me—it is entirely on the effect of that clause that my judgment is founded. I think that the enactment in that clause, that the Bank shall not, directly or indirectly, hold any ships or other vessels, if it stood alone, would disable the corporation from setting up a title in a court of justice to any ship or vessel, either as absolute owners or as mortgagees. An assignment to them, either as purchasers or by way of security, would, I think, in the face of that enactment—if it stood alone—be wholly inoperative, because made against the express provisions of an act of parliament which forbids them to hold such property.

I take it to be a general principle of law, that whatever is done in opposition to an express prohibition in an act of parliament is illegal and void, more especially when such prohibition is evidently imposed upon grounds of public policy, as we must take it in the present instance to be. It is no contradiction of this principle that the effect may in some case have been held not absolutely to invalidate the act done, but rather to afford ground of proceeding against the corporation for violating their charter. The distinction which governs the class of cases which I now allude to is plain. They are cases where corporations are not absolutely prohibited from doing the act in question *to any extent* or *for any purposes*, but where they are only restricted within certain limits as to the extent or purpose of the act. For instance, this corporation is authorised to hold real estate for the convenient management of their business, and for no other purpose, and only to the yearly value of 2000*l.* They are not prohibited from holding *any real estate*. A

conveyance therefore of land to them, is not necessarily and *prima facie* void. It may be valid or invalid, according as they have kept themselves within the limits of their charter in that particular. And this is a question into which the crown only has a right to enter, upon a proper proceeding for annulling their charter. It has been held that an individual cannot incidentally call them to account in this respect, and enter into an investigation which does not concern him, as to the general extent of their dealing in real estate and the purposes for which they took a conveyance.

And as the right to hold the land in question, in any such case, must depend upon the fact, whether the limits have been transgressed or not, if that investigation cannot be gone into incidentally, but only in a proper proceeding, for the forfeiture of the charter, it follows that, generally speaking, and for other purposes, it may be taken *prima facie* to be legal; but if the prohibition were general and without any exception, that the corporation shall not directly or indirectly *hold any lands*, then I take it, a court of justice could not, in the face of such an absolute and unqualified prohibition, uphold them in asserting a title to any lands.

Now, in regard to ships or vessels, the prohibition in the beginning of the clause is absolute and without exception as to amount—or otherwise, “*that they shall not directly or indirectly hold any ships or other vessels.*”

If nothing more were said in the charter on this point, then I consider it clear that we could not hold the defendants entitled to a verdict in an action of trover against them for a ship, on the ground that they had taken an assignment of that ship, and were, under that assignment, entitled by law to hold it. If we could, then it would equally follow that in an action of detinue for the ship, the corporation might plead specially that they held it under an assignment, and that we should recognize them as so holding, although an act of parliament expressly enacts that they shall not directly or indirectly hold any ships. That would be a plain overruling of an act of parliament by a judgment of the court; because there could be no room, in the face of such a prohibition, to entertain the surmise

that the assignment might have been made (as in the case of lands) for a purpose which the statute admits.

This can only be when the prohibition is qualified, and admits of exceptions. I am here supposing the prohibition to be without any saving or exception. There is another principle on which I consider that we could not uphold a title taken in the face of an unqualified prohibition of this kind standing alone ;—corporations are mere creations of the law ; the intention of charters granted to trading corporations especially, is to confer certain facilities, privileges and exemptions, which may encourage and enable them to prosecute their objects effectually—and though this, no doubt, is generally done more for the sake of the public, who are to be benefited by their operations, than for the sake of the corporation, yet the legislature has in each case to take care that they set just bounds to the facilities and privileges granted, in order that such corporation may not interfere prejudicially with private individual enterprise, and may not, so far as depends on the solvency of the corporation, endanger the public interest by engaging in imprudent transactions which may involve it in ruin. Whenever we can see that a motive of public policy must have led to some particular restriction which is imposed in the charter, it is our duty to give effect to the intention of the legislature when plainly expressed, and to hold that the corporation cannot legally apply its corporate powers and capacity in a manner totally and unequivocally forbidden by its charter.

But then we are to consider, on the other side, that this direct prohibition against “*directly or indirectly holding any ships,*” is not all that is said in the charter on that subject ; it is followed by these words, “*nor shall the said corporation, either directly or indirectly, lend money or make advances upon the security, mortgage or hypothecation of any lands or tenements, or of any ships or other vessels.*” The way in which this member of the clause begins, “*nor shall,*” &c., shews that it is intended as an additional prohibition, not as anything that can be relied on for relaxing or mitigating the preceding prohibition.

It was ingeniously argued by Mr. Vankoughnet, that if

the legislature meant by the restriction not to allow the corporation to hold a ship for any purpose, this second restriction would be an idle reiteration of what had been already provided ; and that, as we are never to suppose that the legislature uses words idly and without meaning, we should take the first restriction as intended only to prevent the corporation from holding as absolute owners, and that the second paragraph was added in order to carry it further, by preventing them from making advances upon ships.

According to this argument, the first restriction would not apply to this case ; and as the second would not apply except in the case of money lent or advances made in the first instance upon the security of a ship, there would be nothing in the act to restrain the corporation from taking mortgages on ships to secure pre-existing debts, and therefore no occasion to consider whether the proviso in the last three lines of the clause could be extended to ships or not. We cannot, I think, hold this to be the proper construction of the clause. I understand the legislature to declare by it, in the first place, that the corporation shall hold no ships (which is precisely what the defendants are in this action claiming a right to do) ; that they shall not be ship owners, which a mortgagee of a ship, in possession, managing her and receiving the profits, and with power to sell her to pay his debt, must in my opinion, be held to be (a). Various motives of policy may have led to this prohibition, besides a desire to secure the solvency of the Bank. Then, meaning to impose a further restriction without at all releasing from the first, as I conceive, the legislature enacts that they shall not lend money directly or *indirectly* on the *security* of *ships*. This I take to be meant to guard the institution from trusting their funds upon that kind of property, which they might contrive to do, or at least attempt to do, without violating the first prohibition, by directly becoming holders. They are in no way, through trustees or otherwise, directly or indirectly to lend money on the security of ships. If by any device they could contrive to keep themselves out of the first restriction, by not placing themselves ostensibly in the

(a) 4 Bing. 45 ; 4 Com. B. 121 ; 2 Mont. Dea. & De Gex.

position of ship owners, yet they were still to understand by this second restriction that they could nevertheless not legally lend money on the security of ships, in any form or upon any understanding whatever.

This I take to be the clear effect of the clause so far—and then what remains to be considered is the meaning of the proviso at the end of the 19th clause: “provided always, that the said corporation may take and hold mortgages and hypotheques *on real estates and property* in this province, by way of additional security for debts contracted to the corporation in the course of their dealings.”

My opinion upon that is, that it extends to real estates and real property *only*—not to real estates and to every other kind of property, which latter construction would of course include ships; we cannot hold that *real estates and property* mean anything more than real estates. If a man were to devise to A. B. all his real estates and property, I consider that no personalty would pass.

No doubt the words *real estate* alone would include all that could be meant by the words “real property;” for, as Lord Holt has said, it is *genus generalissimum*, and includes all things (a). But still it is customary to use the words “*real estates and property*” precisely as they are used here, and that in the most carefully drawn acts of parliament, as well as in wills and assurances prepared by lawyers.

In the first clause of this same statute the Bank are, by exactly the same form of expression, to hold “real or *immovable estates and property*,” where it is clear that the word property is not meant to include anything but real property. I need only refer to our Real Property Act for proof that “real property” is advisedly used by the legislature, when nothing distinct from *real estate* is contemplated, the one being evidently looked upon as a form of expression as proper as the other; and it is certainly as common.

I think, in the sentence in question, the adjective “real” applies to both “estates” and “property,” and that it is just as if the words had been “real estate and real property,” in which case of course it could have no effect on “ships.”

(a) 1 Salk. 236.

The argument drawn from the use of the word "hypothèques," and its known application in the law of Lower Canada, strengthen this construction. And it is reasonable to impute this intention to the legislature; for where a debtor to the bank might become of doubtful solvency, it would be manifestly expedient to allow the bank to take security for their debt on any real estate he might have; one can conceive no good reason why they should not be allowed to do so; there could be no inconvenience in their holding land; nor could they, by holding it, incur any risk of involving themselves in a hazardous business or in unforeseen liabilities. But the legislature, by prohibiting them from holding ships or vessels, and from holding shares in their own bank or in any other bank, shew an evident impression that there were good reasons against their being allowed to hold that description of property; and one can readily see that there are good reasons, and of a kind that would not at all apply to their holding land—for that could not involve them in liabilities of the same kind.

The same construction which would hold ships to come within this proviso, must equally hold that the stock of the bank itself, or of other banks, would come within it. And I cannot say that I believe that the legislature intended to sanction that, for there would be strong and obvious arguments against it. However that may be, the plain construction of the sentence, I think, does not extend the exception beyond real property; and my opinion therefore is, that, by the 19th clause, the legislature have placed the Bank of Upper Canada under an incapacity to hold ships, from which incapacity they are not relieved by the exception in the latter part of the clause; and I see nothing else in the act, or in any other act relating to this bank, which can affect the question.

A corporation can only be capable of doing what its charter allows. When the charter is silent in respect to their holding any description of property, the principles of the common law apply and enable them to hold it; but when the charter expressly provides that they shall not hold such property, we need no longer speak of what the common

law would have enabled them to do in the absence of such a prohibition.

Then we have only to consider the legal consequence of an assignment being made to the defendants of this property, which their charter prohibits them from holding. The other creditors who expect to receive a dividend upon their claims, can receive it no otherwise than through the assignees—the now plaintiffs—who are not to be looked upon as the mere representatives of the bankrupt, but as vindicating the right of property on behalf of his estate for the benefit of those who are entitled to satisfaction out of it. No doubt they can stand in no better situation in regard to any contracts made by the bankrupt, and on which they may sue or be sued, than the bankrupt himself could have done. They represent his rights, subject to all the qualifications and conditions which were binding upon him, and they cannot in general repudiate what he would not repudiate.

But acts of parliament have made exceptions in this respect, and on behalf of creditors. Assignments of his goods, which he could not have disputed, are allowed to be contested by his assignees as fraudulent, in order that justice may be done to his creditors.

And independently of any statute, there may, I conceive, be cases where the assignees may assert a right of property which the bankrupt might have been estopped from asserting (*a*).

In the case of *Burra v. Clark* (*b*), Gibbs, C. J., appears to admit this. But it appears to me that there is no difficulty of this kind here. Estoppels do not prevail against acts of parliament, and cannot have the effect of upholding what the legislature has made illegal. Cases in illustration of this are constantly occurring in reference to the statute of Maintenance—the usury laws—statute of Charitable Uses—revenue laws, and others that might be cited. If it were not so, the prohibitions contained in such laws would in general be nugatory.

(*a*) 13 Ves. 188; Arch. Bank Law, 442-3; 4 Camp. 355; 2 Atk. 562; Ambler 228. (*b*) 4 Campb. 355.

I consider that the question comes before us here just as it would have done if Mr. Bethune, having never become a bankrupt, had given first a mortgage upon his steamers to the Bank, and afterwards a mortgage upon the same steamers to an individual creditor, who might afterwards claim a right to the steamers on the ground that the Bank could not legally hold them; or, as if the question had arisen in an action between the Bank and an execution creditor of Mr. Bethune's, who insisted on the boats being sold notwithstanding the mortgage given to the Bank. It is so in effect that the question does arise, for the body of creditors on whose behalf the assignees are asserting their right of property, maintain that the boats never could by law have passed to the defendants, because the law disables them from holding them, while the defendants, who are no doubt as meritorious creditors as the others can be, are setting up their title and claiming a right to hold under it. And we are called upon to say, whether the title advanced by them can be sustained by us, notwithstanding the provisions of the statute which constitutes their charter.

Allusions were made to the statutes of mortmain, and to the footing on which the law stands as regards lands conveyed to aliens; but these are not parallel cases. It is no positive statute which says that an alien shall not hold, but on ground of state policy the common law says that upon office found the king shall have the land by his prerogative. The fact of alienage has first to be ascertained by a proper proceeding, which the crown only can direct, and then the right of the crown attaches: without this, the alien cannot be dispossessed, though no one can claim title through him by act of law.

As an individual grantee, he is *prima facie* to be taken as a subject, and to be capable of holding; and it requires the finding of certain facts to prove his disability, and to vest the land in the crown by matter of record.

In the case before us, the Bank exists only by virtue of a certain charter; by that charter itself, the very disability in question is imposed. There is no matter of fact to be proved, in order to establish the disability. As to other

things, it may hold in a corporate capacity, not as to the description of property in question.

Then, as to the consequence of lands being conveyed in mortmain: It is true that, generally speaking, lands so attempted to be aliened do not continue to be the property of the grantor, or descend to his heir, but become the property of the lord of the fee, or of the crown; but that is because some of the statutes of mortmain (not all of them) expressly provide that such consequence shall follow. They make the alienation in mortmain expressly a case of forfeiture, and provide that the immediate lord of the fee may enter, and that if he neglects to do so within a certain time, the king may enter.—I refer to 7 Ed. I. c. 2, and 15 Rich. II. c. 5.

On the other hand, as the Statute of Charitable Uses, 9 Geo. II. c. 36, makes no provision of that kind in regard to devises made void by that statute, the property which is devised, or attempted to be devised, contrary to the act, descends to the heir or to the residuary devisee or legatees, according to circumstances.—6 Ves. 410; 3 Jac. & W. 270; 10 Ves. 280; Shelford on Mortmain, 10, 204; 1 Ves. sen. 108; 1 Cox. 9; 17 Ves. 466; 3 Ves. 327; 5 Russell, 35; Ambler, 645, 20; Br. C. C. 61, 444; 18 Vez. 463; 2 Ves. & B. 294. It is treated as property not specifically disposed of.

But what we have to deal with here is an assignment of chattels, made to a party who cannot by law hold them; who cannot therefore receive that actual transfer of possession which is always considered in law to follow a sale of chattels; and who yet sets up a claim to hold such possession in opposition to the terms of an act of parliament.

As to the hardship which will result, that is always much to be regretted—especially where the amount at stake is very large, as it is here, and where all was no doubt honestly transacted and intended. But the same hardship arises in numberless cases, where assignments are made which cannot take effect because prohibited by positive law: as, for instance, in cases of sales prohibited to be made on the sabbath, lands conveyed by a person disseised, ships transferred without sufficient recital of the certificate of

ownership, and in many other cases. In all these the question is, shall the vendor act so unreasonably as to keep the property for which he has been paid? The answer is, effect must be given to the act of parliament; and when the intended sale falls through in consequence, there is a remedy to recover back the money paid, unless where such remedy is precluded on the principle that the vendor has been *particeps criminis*. And in the case before us, there is after all less force in the objection of hardship, because, according to the case made by the defendants, the large debt due by Mr. Bethune to them had been all contracted on personal security only, and was not money advanced even on the security of this property—still less is *this* the case of money paid out as the price of the property. It is only the disappointment of not getting the additional security for a debt which had already been contracted. But whatever may be the hardship, and however much we may regret it in this or in any other case, we can only give such judgment as we think the law requires us to give; and what I am most desirous of is, that there should be no misapprehension as to the grounds upon which our judgment proceeds. That the parties may clearly understand them, I will repeat them.

1. We cannot, in my opinion, say that the plaintiffs did not shew a case that entitled them to recover damages against the defendants for detaining and using some of the steamers, provided the defendants did not establish, as they endeavoured to do, a legal right to detain them.

2. With regard to the title advanced by the defendants, under their mortgages, I consider that we cannot recognize it as a legal title, under which they can hold against the assignees—for that the Bank Act, 6 Vic. c. 27, which is their amended charter, disables them from holding ships or vessels for any purpose—and the proviso near the end of the 19th clause, which enables them to take mortgages upon real estates and property, in order to secure debts previously contracted, does not grant that privilege in regard to ships or other personal property. It is on this ground entirely that my judgment proceeds.

The plaintiffs failed at the trial, as it appears to me, because the learned judge took a different view of the law on that point ; and though that view may be quite correct, yet as upon the best opinion we can form we think to be otherwise, it follows that we must grant a new trial.

So far as regards lands, the footing on which the corporation is placed by their charter seems to leave no room for doubt : for the convenient management of their business, but *for no other purpose*, they may purchase, acquire and hold real estates and property not exceeding the yearly value of 2000*l.* ; they are not directly or indirectly to hold lands and tenements, except such as they are thus specially authorised to acquire and hold ; nor shall they directly or indirectly lend money or make advances upon the security of any lands or tenements—but they may take and hold mortgages and hypotheques *on real estates and property*, by way of additional security for debts contracted with them in the course of their dealing.

Now if the corporation should purchase a township of land, and take a conveyance of it, in which should be recited that in order to encourage emigration they had resolved to buy a large tract of land, which they were satisfied they could dispose of at such prices as would yield them a considerable profit ; or if they should take a mortgage, in which it should be recited that A. B. was desirous of obtaining such advances from them as he might require in his business for the following year, and had given them that mortgage as a security for such advances as he might thereafter require ; I consider that no court of justice could treat such a conveyance as valid, when it was evident on the very face of it that it was taken in violation of a positive statute, and did not come within the only exception which could render it legal.

It would be impossible, in my opinion, to allow the corporation to recover in ejectment on such a deed ; and they could no more stand upon that deed as defendants, in order to defeat another title and maintain themselves in possession, than they could recover upon it as plaintiffs.

Then, with respect to mortgages on ships, if it be right

to hold that they do not come within the proviso at the end of the 19th clause, which respects real estates and property, then, as there is no other exception which concerns them, the illegality must appear on the face of any deed which the corporation could take of them, as clearly as it could do in the cases which I have supposed regarding lands.

It is material to consider, that by the 19th clause, ships, the capital stock of the corporation and of other banks, are all placed on the same footing; the corporation now in question being prohibited in the same words from holding any of them, or of directly or indirectly making advances upon them.

Whatever, therefore, is the proper construction and effect of the clause, as regards one of these descriptions of property, must be equally the proper construction and effect as regards the others.

These restrictions were not in the original charter granted to this Bank. Why they were inserted in the statute 6 Vic., amending that charter, we cannot judicially know; and inquiries of that kind are not material, except where the words of a statute are ambiguous or obscure. Perhaps twenty years' experience and observation had suggested to the legislature the propriety of such restrictions; and as they were by this latter act greatly increasing the capital of the Bank, perhaps they thought more caution necessary.

It may be, as has been stated, and I believe the fact was so, that this 19th clause is merely a transcript of a clause which is used in bank charters in other countries, and was adopted by the legislature from those examples. If so, we have no right to say that motives and reasons for such a clause existed in other countries which do not equally apply here, and so that we should give it on that account a different construction from that which the language would naturally lead to. When the legislature adopted the clause, they pronounced that such restrictions were expedient here, and we must give effect in good faith to the provision.

As to ships, it could not be that the legislature were influenced by a consideration that the corporation could not properly comply with the regulations of our Ship Registry

Act, because that did not pass till some years afterwards ; and in 1842 we had no regulations for registering shipping used in these inland waters.

But the legislature may have thought that it was well to guard against the corporation applying their capital and corporate privileges to speculations which might interfere injuriously and unfairly with private enterprise, or might involve the bank in business of a very precarious and hazardous nature, or enable them to acquire a monopoly to the general prejudice of trade. And so, as to their acquiring stock in other banks or the stock of their own bank, it is obvious there are strong reasons against such a course, as regards the general interests of the public and the solvency of the corporation, and the consequent security of those holding their notes.

There is nothing impossible or even improbable, therefore, in our supposing that the legislature did mean to restrain the corporation altogether from holding these descriptions of property for any purpose, or from looking to them in any manner for security in the course of their transactions, in order that they might always understand and bear in mind that they were merely to discount paper on the personal credit of those who were parties to it, and that they could look to nothing else in making their loans ; although, by way of additional security for debts already contracted, they should be allowed to take mortgages on real estate, because that could not involve them in any hazardous business, nor be impolitic or inconvenient on any other ground.

We purposely omit to express any opinion on the question, whether the bank and all other corporations aggregate are incapable of being owners of ships, either from their inability to comply with our Ship Registry Act, or on any other ground, because it is unnecessary to determine that question in this case, if we are right in holding that the bank are, on the particular ground of the disability imposed by their charter, incapable of holding ships. And for all that we know, an extra judicial opinion on that point might tend to unsettle a good deal of property without necessity. It

will be time to determine it when some case comes before us which necessarily turns upon that question.

Neither do we take into account, on determining upon this motion for a new trial, the objection raised for the first time upon the second argument of the rule, that the assignments made by Mr. Bethune of ships, of which he had become the registered owner, and which contained in them no proper recital of the certificate, are absolutely void for that defect.

The point itself I take to be finally determined in the cases of *Watkins et al. v. Corbet*, and *Coleman v. Sherwood*, by which we are bound; and perhaps, if it had been necessary, we could not have avoided giving effect to it, in however late a stage it had been brought to our notice.

Mr. Vankoughnet was so obliging as to furnish us with a late edition of a very valuable American work on corporations, by Angel & Ames, which I have carefully looked over, as I have indeed looked at everything that has been cited in this case by the learned counsel, who argued it most ably on both sides.

I see nothing in this work which I consider inconsistent with the opinions which I have expressed in regard to the legal effect of the clause in question here; always bearing in mind, however, the distinction between charters which do allow property of any certain kind to be held to a limited amount or for certain purposes, and those charters which make the corporation incapable of holding such property *to any extent or for any purpose*; the difference, in other words, between a total denial of capacity, and a qualified and modified denial—by which I mean restriction to certain limits, which the corporation must take care not to transgress.

I do indeed observe in that work two or three decisions quoted as having taken place in certain States, which it does not appear to me we could concur in, if the charters on which they were founded were exactly like that before us. I mean decisions which render of no force or meaning the distinction made in the charter, between taking land in security for pre-existing debts, or making advances on the security of land. These are spoken of in the work as in-

stances of a liberality of construction; and I think, if the charters to which the construction was applied was like the one before us, it certainly was a liberality of construction which directly overruled the provision made by the legislature. What I now allude to, however, bears only on a point on which our decision of this case does not turn (a).

DRAPER J.—But for the provision in the first section the corporation could not have held a fee simple estate in land at all, except by license from the crown. The statute of mortmain would have disabled them from holding, though not from purchasing or taking.

In addition to this disability, the 19th section also adds its force as regards lands and tenements, saving the exception in the first section, and as would seem renders the bank incapable of holding, even by license under 7 & 8th Wm. III. ch. 7; and it extends, and without any saving or exception, this prohibition to *hold*—to ships and vessels—using language of most general import, and applicable, whatever may be the purpose or object. After other prohibitory and disabling enactments, this section ends with a proviso qualifying the prohibition, by permitting the bank to take and hold mortgages, and hypotheques on *real estates and property* in this province, by way of additional security for debts contracted to them in the course of their dealings.

And but for this proviso the bank could not hold lands, except so far as the first section enabled them. A similar construction must be applied to their holding ships or vessels, and they cannot be held unless they fall within the exceptional proviso. A question then arises whether the words “real estates and property” are confined, and must be read real estates and real property, or may be read real estates, and any other kind of property.

The term hypotheque was much commented upon in the argument, as evincing that this proviso extends only to real property. Without professing to give a judicial exposition of its meaning, it is enough for the present purpose to say, that I think it rather introduced to enable the bank to take that species of security in Lower Canada, according to the

(a) Angel and Ames on Corporations, 115 *et seq.*

laws of that part of the province, where the term has a well known meaning and application under a system of laws differing from our own, than as intended to create a new term or provide a new security in Upper Canada. Such an enabling power might well be thought necessary, whether in reference to transactions sanctioned by the 4 & 5 Vic. ch. 99, or under this charter, which extends over the whole province. But I do not feel driven to any argument deducible from the strict meaning of the word "hypothèque;" for I have been unable to suggest to myself a plausible doubt, that this proviso and these words relate to real estates and real property only; and they do not, nor were they designed to authorize taking additional securities for antecedent debts on ships and vessels. This construction is in conformity with the language of the first section, which permits the bank to hold "real and immovable estates and property;" the word "*property*" being, as it is in the 19th section, coupled with the phrase "*real estates*," and there being no room for doubt as regards the first section, that real property only is meant, and that the terms used refer only to lands and tenements. This conclusion further seems to me in the clearest accordance with the object and intent of the prohibitory enactments immediately preceding the proviso, and moreover to be the natural and grammatical interpretation of the sentence. A construction which would deal with the word "property," as not limited and explained by the adjective "real," would warrant the bank in taking security on every species of personal property, perishable or otherwise, and must inevitably lead to one of the very acts prohibited—namely, that the corporation on taking possession (and the necessity of such a step may be reasonably assumed) of the personal property mortgaged, and in disposing of it (equally necessary if perishable), would directly deal in the selling of goods, or in a trade other than such as generally appertains to the business of banking. Enough has transpired in this case to shew, how speedily the necessity may arise in regard to ships and vessels—to do more than simply to take and hold them as security by mortgage or hypothèque, how unavoidable it may become to take actual possession of the

ships or vessels themselves ; and if so to hold, how difficult to avoid dealing with them—in a trade certainly not appertaining to banking. For, though the 23rd sec. of 8 Vic. ch. 5, exempts a mortgagee from being subject, by reason of a transfer to him as a security for the payment of a debt, to the general liability which attaches upon owners of ships and vessels, such exemption cannot continue after the mortgagee ; in place of selling the mortgaged vessel, takes possession and makes use of it. In which case, I apprehend, he incurs the same responsibilities as attach upon an owner deriving title by an absolute purchase.

I have considered some notes of American decisions, which are referred to in Angel and Ames' work on corporations, in which a great liberality of decision has been shewn by the courts in construing charters granted to banking or trading corporations. Without seeing the precise terms used in the charters in those cases, and also without knowing exactly what is the law of the State in which those decisions were respectively given, it would not be safe to rely on them here. Such as I have seen relate to land, and sustain a distinction between a restriction from purchasing an holding, and a restriction from holding only, laying down as the rule in the latter case, that an individual suitor cannot put the corporation to prove that it has *purchased* more than its charter permits it to *hold*. I take it that under the statute of mortmain, which forfeits the land to the feudal superior, or on his default to the crown, a similar principle might prevail, though when the conveyance or devise is merely void, or contrary to the 9 Geo. II. and no forfeiture is created, the land descends, as if no such conveyance or devise had been made.—See attorney-general v. Lord Weymouth, 1 Amble 20. But I do not see how it can govern a case where the charter expressly prohibits the holding any particular kind of chattel property, not forfeiting such property to the crown, but wholly incapacitating the corporation from holding it, which I think in respect to chattels, must be considered an equivalent to a prohibition to acquire it ; and I therefore do not feel at all pressed by the objection urged at the bar, that the plaintiffs, assignees of the mortgagor

to the defendants, cannot be heard to deny the defendant's title.

The plaintiffs were of course bound in the first place to shew their title, and I think they did so sufficiently to entitle them to recover, for some part at all events, unless the defendants could displace such title by evidence of their own right. For this purpose the defendants in the first plea advanced their mortgages, and in the second contended that they were in possession by parol authority, derived from Mr. Bethune before his bankruptcy, or by authority given by the defendants themselves. For the reasons already given I think the defence on the mortgages fails. Nor do I at present think the second ground more available; and at all events the facts on which the ground of defence is, if at all sustainable, should have been left to the jury for their decision; for, until the defendants made out their title, the plaintiffs, as assignees of Mr. Bethune, had the right of property and of possession.

With regard to the evidence of conversion, I am of opinion there was evidence of a conversion, in fact of several of the boats, sufficient to go to the jury; even if the demand and refusal be deemed insufficient to establish a conversion, either because there was no absolute refusal, or because the demand was too large—the defendants insisting they were not in possession of three of the boats (a).

At the last argument the plaintiffs' counsel also insisted on an objection not previously taken—namely, the want of a sufficient recital of the certificate of ownership in three several mortgages held by the defendants; and they relied on the case of *Sherwood v. Coleman*, decided in this court (b).

I think there should be a new trial, independently of this objection, and do not rest my judgment upon it in disposing of the present rule. I have, however, availed myself of the occasion again to consider the question, important in itself, and one with which our practice has not made us very familiar.

(a) *Jones v. Fort*, 9 Bl. C. 764; *Alexander v. Southey*, 5 B. & A. 247; *Abington v. Sepscomb*, 1 Q. B. 776. (b) 6 U. C. R. 614.

The section of our statute, rendering such recital necessary, is an exact transcript of the 31st sec. of the British stat. 3 & 4 Wm. 4, ch. 55. The case of Bryson v. Gibson (*a*), involved a question of the validity of a bill of sale, containing a proviso for its becoming void, on payment of a certain sum of money. The action was between the mortgagees and the assignees of the mortgagor, who had become bankrupt. It was never questioned that the 31st sec. of the British act was applicable to, and governed such a bill of sale. In this case the bill of sale is set out *in hæc verba*, and we have thereby an opportunity of seeing how *in practice* the British statute was construed, and we find the certificate recited at full length, including the indorsement of the name of the owner, and the number of 64th parts held by him. That case is also an express authority to shew that a bill of sale becomes valid on the registration thereof, and from the date of registration only, having no relation back to the day of its actual execution, which was also a question mooted at the trial of this cause.

I have, in pursuing this question, adverted to the 12th section of our statute, which renders it necessary for the owners of any ship or vessel to take out a certificate of ownership *de novo*. If the vessel shall in any manner whatever be allowed, so as not to correspond *with all the particulars* contained in a previous certificate, and to the 8th section, which expressly provides that an alteration of the tonnage due to the cubical contents of the engine-room of a steam vessel shall be deemed to be an alteration requiring a certificate *de novo*, *a fortiori*, I apprehend, would the putting a steam-engine on board a vessel not before propelled by steam, and the consequent construction of an engine-room, where there was none before, be such an alteration. At the same time the 8th section expressly provides that the tonnage due to the cubical contents of the engine-room shall be deducted from the total tonnage of the vessel, and that the remainder shall be deemed the "*true register tonnage*," which is to be deeply carved on the main beam. Now, assume a sailing vessel to be length-

ened, for the purpose of being converted into a steam vessel, and an engine-room to be constructed in her of such dimensions that the tonnage due to the cubical contents of such engine-room shall exactly correspond to the increase of tonnage of the whole vessel occasioned by her increase of length, the true register tonnage would be unaltered, and would appear as it appeared before, in the same figures carved on the main beam; but I apprehend it does not admit of a question that a certificate of ownership *de novo* would be indispensable; and yet if the recital adopted in the indenture of the 20th May 1847, be a sufficient compliance with the words of the act, requiring a recital of the certificate of ownership, or of the principal contents thereof, then such a change on the vessel herself, or in the certificate of ownership, would require no change in the mode of recital; for the date of the certificate of ownership is not set forth as a part of the recital, any more than the number of such certificate or the name of the collector signing it. The recital follows the words "*it is certified*" and shewn—the name or names of the owner or owners, state that he (or they) have made and subscribed the declaration required by the statute, and have declared that he (or they) was (or were) the owner (or owners) in the proportion mentioned on the back of such certificate, "of forty-eight shares of the ship or vessel called (the name), of Toronto, which is of the burthen of (the number stated) tons, and whereof (captain's name) then was master." All which particulars in the case supposed, would be equally true of the same vessel when she was a sailing vessel, and when she was altered into a steamer, and would be also true, though her number of masts was changed, and her head altered by being made a figure head, or *vice versa*. I have put an extreme case, but it is not an impossible case, and it assists in determining what ought to be considered a recital of the "principal contents" of a certificate of ownership.

If therefore, it were necessary to consider this question, in disposing of the rule for a new trial, it would, as I am at present advised, afford additional reason in favour of the application; but, irrespective of it, I am of opinion the rule should be made absolute.

There are other points raised in this case to which I have not adverted, because I have made up my mind that a new trial should be granted, on the grounds to which I have particularly referred. As at present advised, I concur generally in the opinion so fully expressed by the Chief Justice. The very elaborate judgment delivered by him renders a further discussion on these matters unnecessary on my part.

Per Cur.—Rule absolute for new trial.

ALDERSON V. STEWART.

Libel—What evidence sufficient to connect the alleged libellous matter with the plaintiff.

Where the defendant read to the jury letters of his own, addressed to the plaintiff's attorney, and commented upon them, the court refused on that ground to allow the plaintiff's counsel to reply.

Case for libel. The declaration stated that the plaintiff was on 1st May 1796, married to one William Barker, who died in June 1807, and was again married in February 1825, to one John Alderson, who died in June 1830: that during her marriage with William Barker the plaintiff had by him several children, among whom was one Edward John Barker; and after the usual statement of plaintiff's good character, and of defendant's malicious intentions, set out the libel, of and concerning the plaintiff, and of and concerning the birth of the said Edward John Barker, and of and concerning the said William Barker—"of the Barkers"—(meaning among others the said William Barker) "*that was the name of his reputed father,*" (meaning the reputed father of the said Edward John Barker): what was his mother's (meaning the mother of the said Edward John Barker, meaning the plaintiff), *when he* (meaning the said Edward John Barker) "*was born, I either never knew or have forgot, but I know it was not Barker,*" (meaning and insinuating thereby that the plaintiff gave birth to a bastard child, and that she was not at the time the said Edward John Barker was born of her body married to the said William Barker, and that the said Edward John Barker was and is a bastard child of her the plaintiff, had by the said William Barker, or some other person of the name of Barker).

The defendant pleaded not guilty ; and that the plaintiff was not the mother of the said Edward John Barker.

At the trial at the last assizes at Kingston, before Draper J., the plaintiff established her marriage with William Barker, and that she had three sons ; and that Edward J. Barker was the second of these sons, born during the coverture. The defendant insisted that the plaintiff was not alluded to in the alleged libel ; that it imported that Edward John Barker was not the son of the wife of William Barker, and could not be understood as intending to charge William Barker's *wife* as being the mother of Edward J. Barker, and therefore it was not written of and concerning the plaintiff ; and the jury gave a general verdict for defendant, stating that they did so on the ground that the libel was not written concerning the plaintiff.

K. Mackenzie in this term obtained a rule *nisi* for a new trial, on the ground that the verdict was contrary to law and evidence and the judge's charge. He also objected that the defendant, who conducted his own case at *nisi prius*, read a letter written by himself to the plaintiff's attorney, respecting the bringing of this suit, and commented on other papers and documents ; among others, the judgment of this court on the demurrer in this cause—none of which were in evidence ; and that the plaintiff's counsel should have been permitted to reply, which was denied him. He also filed affidavit to shew that the defendant was before the publication of the libel, well aware that the plaintiff was the mother of Edward J. Barker. The defendant shewed cause in person, and filed an affidavit to rebut the plaintiff's affidavit.

ROBINSON, C. J. delivered the judgment of the court.

We think the defendant must be allowed to retain his verdict. The defendant managed his own case before the jury, which is seldom an advantage ; and one of the inconveniences to the opposite party and to the court is, that from the necessity of making some allowance for the want of knowledge of rules of evidence and modes of proceeding, there is a tendency on such occasions rather to allow a defendant too great a latitude than to restrain him within

too strict bounds, and it is indeed difficult to restrain him promptly and effectually, because he frequently does not know, and may sometimes affect not to know when he is transgressing, or to comprehend the limits which the court wishes to confine him to. Here the defendant, in addressing the jury, chose to read some letters of his own writing to the plaintiff's attorney, in relation to this suit and the subject of it. He was at liberty to have made the same remarks in his speech, and whether he spoke them or read them was immaterial. They were not evidence of any thing, and one would be unwilling to think that they could have had any influence with the jury. At any rate, if we should have taken the ground of improperly refusing a reply as a reason for granting a new trial, which I confess I should be always unwilling to do, we think there was no ground here for allowing a reply.

Then, as to the propriety of the verdict, there is no inconsistency between the verdict and the judgment which this court gave upon the demurrer in this same cause. They may both stand together without difficulty.

Upon the demurrer, all that we decided or were called upon to decide was, that the libel was not incapable by reasonable construction of being so applied as to point to the plaintiff, who complained that she was defamed by it, and that it might very naturally and justly be so applied, provided the jury on the trial should be satisfied that the plaintiff was really the person meant, and that no other person was intended. We only pronounced that looking at the record, we were not authorized to hold that she *could not be the person alluded to*, which was what the defendant contended for when he demurred. Still it remained for the plaintiff to satisfy the jury upon the trial that the libel was published "of and concerning the plaintiff," as she alleged it was. The jury have found otherwise, saying expressly that they were not convinced that the libel referred to this plaintiff. We might think that the evidence was such, as ought reasonably to have satisfied them that the defendant must have known that the passage alluded to, and which he republished, must have been intended expressly to reflect

upon this plaintiff; yet it would not necessarily follow, that we should for that cause grant a new trial in a case of this kind, which is an action in *pænam*, and in which verdicts for the defendant are only to be set aside upon some clear ground. I refer to what was said by this court in determining the demurrer, and to the pleadings, which must be considered in connection with it.

We cannot tell but that the jury may have had doubts whether it may not have been known to the writer of the letter, which after an interval of many years, the defendant republished in his paper (an act which there could be no doubt he would have done much better to omit) that some other person was in fact the mother of Mr. Edward Barker than this plaintiff, who it is proved was his reputed mother, and that the original writer of the article meant only to say, that what the name of the real mother was he did not know, but that he knew it was not Mrs. Barker when Edward Barker was born, though the writer might not have known whether she did or did not afterwards become his wife, not knowing perhaps the history of the family. Anything written under such an impression would not imply any intention to defame this plaintiff, who might not have been in the contemplation of the writer at the time, and of whom he possibly may not have had any particular knowledge.

If the jury had any doubt on that point, they probably were more inclined to give the benefit of that doubt to the mere republisher of the article than they would have been to give it to the person who composed it nearly twenty years ago.

I must say, I should have thought that a verdict for the plaintiff for any damages which the jury might have thought it right to give, would have been more easily to be reconciled with the evidence, but we do not think we should set the verdict aside, considering the ground on which the jury expressly gave it.

It was contended that there was no misdirection; it was proved at the trial that the plaintiff was in fact the mother of Edward Barker, and that there should therefore have been a verdict for the plaintiff on the second plea, which

denies that fact—the objection, however, extends only to the defendant's right to costs on that issue, and there should be no new trial on account of it, unless it was pointed out at the trial, and a request made to have the verdict so entered, and unless the defendant should now refuse to assent to that being done.

Per Cur.—Rule discharged.

PONTON, ASSIGNEE OF RIDDELL, A BANKRUPT, V. MOODIE, SHERIFF, &C.

Where a cognovit has been given by a bankrupt in fraud of the Bankrupt Law, and is therefore with all steps taken under it, void—the assignees of the bankrupt in bringing an action against the sheriff, must be looked upon as contending for the interests of the creditors, and not merely as representing the person or estates of the bankrupt; they therefore will not be estopped, as the bankrupt might, from disputing the validity of the cognovit and subsequent proceedings on the ground of fraud.

Semble—That a party may apply his verdict to a different count from that on which he elected to take it at the trial, where the evidence given will support such count.

Trover for goods of the bankrupt, on counts laying the conversion in the time of the bankrupt, and others in the time of the assignees.

The declaration contained two counts, but the plaintiff at the trial abandoned the second, relying only on the first, which laid the possession of the goods in Riddell before his bankruptcy, viz., on the 20th March, 1849, and that the defendant well knowing the goods to belong to Riddell, but contriving to defraud the said Riddell and the plaintiff as assignee as aforesaid, hath not as yet delivered the said goods and chattels, either to the said Riddell or to the plaintiff as assignee as aforesaid, although often requested; and afterwards and before the said Riddell became a bankrupt, to wit, on the day and year last aforesaid, converted the goods to his own use.

Pleas.—1. Not guilty.

2. Riddell not possessed.

3. Justification under a *fi. fa.* at the suit of McKay, under which the defendant sold before Riddell's bankruptcy.

4. Similar justification under a writ of *fi. fa.* at the suit of Doremus & Nixon.

The plaintiff replied to the pleas, justifying under the

executions, that they were issued upon judgments voluntarily confessed by Riddell in contemplation of bankruptcy, and with intent to give a fraudulent preference to the execution creditors, of which notice was given to the defendant before the sales were made under the execution.

The defendant rejoined that the confessions of judgment were not given in contemplation of bankruptcy, and for the purpose of giving a fraudulent preference.

The verdict turned entirely upon the question of fact whether the confessions of judgment had been given in contemplation of bankruptcy, and for the purpose of giving a voluntary preference to those particular creditors.

It was, however, contended also by the plaintiffs, that the confessions were given in a manner and for a purpose which rendered them void, under the statute 13 Eliz. ch. 5, being given to defeat and hinder creditors; merely colourable, a contrivance of the debtor's own to save the goods from other creditors.

It was left by the learned judge to the jury to find—1st. Whether the confession to McKay was given to cover the goods from other creditors, and so to defeat or delay them. and not *bona fide* for enabling McKay to recover his debt, If so to find for the plaintiff. If not so, then to find—2ndly. Whether the confessions were given under compulsion or pressure of McKay, and not voluntarily by Riddell, for the purpose of giving McKay a preference in fraud of the bankrupt laws.

They were told that on that point the evidence was contradictory. According to the testimony of one Franks, who had been intimately connected with Riddell in carrying on business on a footing not clearly made out, the confessions would appear certainly to have been given by Riddell voluntarily, and in contemplation of bankruptcy, in such a manner as would make them clearly fraudulent in view of the Bankrupt Act. If, on the other hand, the jury gave credit to the testimony of McKay, the execution creditor, who was examined as a witness, and who had given a bond of indemnity to the sheriff, then they might find that the confessions were not given voluntarily, but upon pressure of

McKay the creditor ; in which case their verdict would be for the defendant.

The jury gave their verdict for the plaintiff, 288*l*.

The defendant, by *Eccles* his counsel, moved to enter nonsuit on leave reserved (this was abandoned, as no leave was reserved) or for a new trial on the law and evidence, and for misdirection and the admission of illegal evidence, and on affidavits filed ; or to arrest judgment, on the ground that trover would not lie against a sheriff who seizes and sells goods of a bankrupt before the bankruptcy, under a *fi. fa.* against his goods : and because it was not shewn that the commission issued while the bankrupt laws were in force, (30 May last). He cited *Eden's Bankruptcy*, 32-3 ; *Brent v. Perry*, 5 U. C. R. 538 ; 2 Moo. & Rob. 68 ; 4 B. & Ad. 87 ; 1 Lev. 95 ; 1 & B. R. 17.

Hagarty shewed cause. He cited 13 M. & W. 104 ; 1 C. & K. 449 ; 7 M. & W. 353 ; 4 Scott, 587 ; 10 M. & W. 37 ; 11 Jurist, 286 ; 11 M. & W. 277-363 ; 8 Jurist, 697 ; 4 Q. B. R. 674 ; Str. 1066.

ROBINSON, C. J. delivered the judgment of the court.

As regards the merits, we think there is nothing arising on a view of the evidence given at the trial, or on examination of the affidavits filed since, that should lead us to grant a new trial.

The effect of the verdict is to allow the creditors at large to share in the assets of the debtor, who, by a confession given when he must have been conscious he was in failing circumstances, would have excluded them from participating. This is just, and we should therefore not interfere, so far as our view of the merits is concerned, unless we can see clearly that the jury have gone against evidence which they had no good reason for disbelieving. We cannot say that of this case. The evidence of Franks is very clear and direct—the circumstances in themselves were suspicious. McKay, it is true, gives a different account, but he had indemnified the sheriff, and was clearly in a position to be greatly biassed. The jury were told to weigh one account against the other, and say which they believed, and they have found for the plaintiff.

Then as to the legal point raised: the cognovit on which the judgment was entered was given to McKay on the 26th February, 1849. Judgment was entered on the 10th March, 1849, and *fi. fa.* issued on the same day it was given to the sheriff, on the 29th of March. The sheriff was notified of the bankruptcy on the 31st March, and took an indemnity bond from the creditor on the 11th April, having sold his goods on the 7th April. The commission of bankruptcy was issued on the 23rd May. The assignees were appointed in July. The Bankruptcy Act expired on the 30th May, but all proceedings in cases pending were to be carried to an end.

The second count it, is noted by the learned judge, was abandoned at the trial, but the verdict was taken generally, and all that can be said is, that the plaintiff's counsel said he would confine himself to the first count; but no evidence was withheld in consequence—all the facts were brought out and went to the jury; and if we should see that those facts would support a recovery under the second count, and not under the first, the question would still be whether we should grant a new trial, when upon such second trial the plaintiff would have a right to apply the same evidence which he has now given to either count.

There are cases in the books in which the court has allowed a party to apply his verdict to a different count from that on which he elected to take it at the trial, but of course that could only be done where the evidence maintained such count and no other.

But taking the case on the first count, we consider that on the finding of the jury, we must hold the confession of judgment to have been a fraud on the bankrupt law, and all that was done under it void; and if so, then that the assignee must be looked upon in this action as contending for the interests of the creditors, and not merely representing the person and estates of the bankrupt as an agent or executor would, and on that account liable to be estopped from disputing whatever he could not dispute; and though he might be unable to say that the cognovit and judgment were fraudulent, yet the assignees may urge it on behalf of the creditors, and may contend that the sheriff, by the seizure

of the goods on 7th April, by force of an alleged authority which the law has made void, converted the bankrupt's goods, and thereby afforded a ground of action which has devolved upon them.

The first count is on such a cause of action, and we think the evidence supports a recovery under it, and that this rule therefore must be discharged.

Per Cur.—Rule discharged.

ROBERTSON V. COOLEY ET AL.

Marginal reference—"According to the statute," instead of "by statute"—its sufficiency.

Where, to an action of trespass, the defendant pleaded "not guilty," and inserted in the margin "according to the statute," instead of "by statute": Held, *per Cur.*, marginal reference sufficient.

Declaration.—Trespass and false imprisonment.

The defendants justified under legal authority.

At the trial, the plaintiff objected that they could not avail themselves of their defence under the general issue, which they each had pleaded severally; because, instead of marking their pleas as the rule requires in the margin "by statute," they had marked them with the marginal note, "according to the statute."

The learned judge, however, received the evidence; and there being a verdict for the defendants, a new trial was moved for, on the ground that the evidence was illegally received.

ROBINSON, C. J., delivered the judgment of the court.

Our 16th rule, Easter Term, 5th Victoria, provides, that in every case in which the defendant shall plead the general issue, intending to give the special matter in evidence by virtue of any statute, he shall insert in the margin of such plea the words "by statute," otherwise such plea shall be taken not to have been pleaded by virtue of any statute; and such memorandum shall be inserted in the margin of the *nisi prius* record.

The words of the rule are precisely the same as those of the English rule on the same subject, and there is no reason

why they should receive a more or less rigid construction here than in England.

We have no case in England in which a question has arisen as to the allowance of any other words in the margin as sufficient than the very words "by statute;" and the point to be determined is, whether we can read the rule as if it contained the words "or to the like effect." We do not think the plaintiff could be misled by the substitution of the words "according to," instead of "by;" and not being willing to multiply the occasions for such exceptions, we are disposed to think the memorandum sufficient, though the rule has not been literally complied with.

Per Cur.—Rule discharged.

THE QUEEN V. LEEMING ET AL., EXECUTORS OF APPLGARTH.

Liability of Executors of Sureties for defalcations after death of Surety.

The executors of sureties are liable for the defalcation of the principal committed after the death of their testator, and even after notice given by the executors that they would not be liable.

On the 21st of March, 1848, Applegarth made his bond to the Queen in 500*l.*, and afterwards died, leaving these defendants his executors; and *sci. fa.* was brought upon this bond, to have execution against his goods and lands in the hands of his executors.

The defendants pleaded, setting out the condition of the bond, which was, that John Chisholm, appointed collector of tolls at the Burlington Bay Canal, should pay over and duly account for all monies received by him, &c.; and the defendants pleaded that Chisholm always faithfully accounted for and paid over, &c.

The Attorney-General replied, suggesting the death of Land, one of the executors, and setting forth that Chisholm entered upon the office on the 21st of March, 1828, and continued in it till the 5th of January, 1843; and that in that time he received large sums of money—viz., 25,000*l.*—for tolls, &c., which he neither paid over nor accounted for, and that the monies were still unsatisfied; wherefore he prayed judgment to recover the said bond.

The defendants rejoined to this, that Chisholm, before

the commencement of this suit—viz., on the 4th of January, 1843—"well and truly accounted for and paid over to the Receiver-General of this province, the said sums of money received by him as aforesaid," and concluded to the country.

The only question raised at the trial was, whether the Crown was entitled to recover against the executors in respect to monies received by Chisholm after the death of the surety.

Verdict for the Crown, with leave to move to enter a verdict for the defendant.

ROBINSON, C. J., delivered the judgment of the court.

There can be no doubt that the executors continue bound, as the principal was bound. *Barton et al. v. Executors of Jacques*, 8 T. R. 459, is a case of the same kind; and *Calvert et al. v. Gordon*, 7 B. & C. 809, cited by Mr. Richards, makes the point perfectly clear; for there the executors of a surety were held liable for fresh defalcations after the death of the testator, though they had endeavoured to relieve themselves by giving notice before such defalcations occurred, that they would not be liable.

Per Cur.—Postea to the Crown.

WATT V. BUELL.

Set off—Setting aside plea of.

Refusal of the court—upon the facts stated below—to set aside summarily a plea of set off. (See *Watt v. Buell*, in the July number of *Chamber Reports*, p. 103.)

Philpotts obtained, last term, a rule *nisi* to set aside an order made by Mr. Justice Macaulay in this cause, in Chambers, on the 17th September last, discharging a summons which the plaintiff's attorney had obtained, to shew cause why a plea of set off, pleaded by the defendant, should not be set aside on grounds disclosed in affidavits filed; and this court was moved to strike out this plea, with or without costs.

The defendant, on the 20th March, 1847, made this note: "Two months after W. Watt and wife execute a covenant deed to me, in the usual form, of lot 5, &c., adjoining my

part of said lot, I will pay 25*l.* currency—the same being part of the purchase money—to him or his order.”

George Kerr swore that he took this writing, supposing it to be a promissory note, and with the defendant's knowledge and acquiescence, it being transferred to him by the plaintiff Watt in the defendant's presence; on which occasion he (George Kerr) gave up to the plaintiff a mortgage, which he held for a certain debt, conceiving that this note would be good in his hands for the amount: that he afterwards transferred the writing now sued on to his father, Dawson Kerr, who was now the real plaintiff in this suit, for a valuable consideration; and that if the defendant was allowed to defeat Dawson Kerr's action upon it, brought necessarily in the name of Watt, great injustice would be done.

The defendant, by *Richards*, his counsel, filed an affidavit, giving a different colour to the transaction, and swearing that it was understood between him and George Kerr, that if he would give Watt this writing, it should remain in George Kerr's hands, to be taken into settlement of accounts with George Kerr, who was then indebted to him, and has since become bankrupt.

The cases cited were—1 Arch. Pr. 272; 4 U. C. R. 350; 8 M. & W. 511; 15 M. & W. 304; 11 M. & W. 84.

ROBINSON, C. J., delivered the judgment of the court.

We think the learned judge before whom the application was made to strike out the plea of set off, judged rightly in declining to do so.

Admitting the case to come within the principle on which pleas of release have been in some instances set aside as fraudulent, yet the plaintiff's application is met by that kind of statement in the defendant's affidavit, which leaves the fact as to the intention and understanding of the parties too doubtful to make it proper to grant the application.

We can quite suppose that the plaintiff may have thought the writing to be a valid promissory note when he took it, and so might George Kerr: few persons, indeed, who were not lawyers, would be likely to know that it was not.

And again, we cannot well suppose that the defendant conceived that he was giving a writing of which the benefit must be confined to the plaintiff Watt, and was incapable of being transferred to any one; for he inserted the words "or order," which denote negotiability; and he, as an attorney, must have known that. It would look like an intention to deceive, if he were to contend against any one but Watt claiming under that writing. But what he (Mr. Buell) asserts is this—that he came into the arrangement to serve Watt and George Kerr, and on an understanding that he could answer their purpose by engaging to account to George Kerr for the sum named, on Watt's account; that he was to settle the amount with George Kerr, and no one else; and that he had a demand against him, against which this was intended to be set off, as was known to the parties; that George Kerr has become a bankrupt, and is endeavouring to make a dishonest use of this writing, and to evade his own liability by transferring the writing to a third party.

We cannot try the matter on affidavits. It is only on a perfectly clear case that we could interfere summarily.

Per Cur.—Rule discharged.

ROBERT JOHNSON, BY CATHERINE JOHNSON, HIS NEXT
FRIEND, V. MCGILLIS.

Mother—Her right to sue in trespass as next friend, for an injury done to the land of her son, a minor.

The mother, in possession of the land belonging to the heir, a minor, may sue in trespass, *qu. cl. fre.*, as the next friend of the minor.

Trespass *quære clausum fregit*.

Pleas—1st, Not guilty.

2nd, The close not the plaintiff's.

3rd, That the *locus in quo* was a public highway, and justifying as path-master in performing statute labour thereon, by direction of the superintendent of highways.

4th, A right of way.

The plaintiff took issue on these pleas.

Verdict for the plaintiff—6*d.* damages.

The defendant moved for a new trial on the law and

evidence, and for misdirection, and because Catherine Johnson, being the person in actual possession of the close, should have sued, and not the plaintiff as heir, the injury not being to the reversion.

McDonell, Solicitor-General, shewed cause. *J. Lukin Robinson* supported the rule.

The authorities cited were—4 Wm. IV. ch. 1, sec. 25; 8 C. & P. 99; 5 Jurist, 170; 5 B. & al. 223; Bac. Ab. Guardian; 5 T. R. 472.

ROBINSON, C. J., delivered the judgment of the court.

We have examined the evidence, and find no reason to interfere with the verdict so far as regards the question of boundary which was in dispute. The evidence was contradictory, and would have warranted a verdict in favour of either party, according as the jury gave credit to the plaintiff's witnesses or the defendant's.

The complaint is, that the defendant, who was a path-master, in applying statute labour, went out of the true concession line between the fifth and sixth concessions, and encroached on the front of the plaintiff's land. No real damage was done, and I dare say nothing wrong intended. The action is brought to try the question of boundary, and the jury gave properly a nominal verdict only. It is but a very narrow strip of land that is in dispute—a few inches, or at the most two or three feet. The evidence of a respectable surveyor fully supports the verdict, though on the other side there was evidence of the actual position of the post originally planted; and according to that, a ditch which the path-master dug would be within the limits of the concession line, and would not be north of it, and on the plaintiff's land. This evidence, too, was of a very positive kind; but the jury, in giving credit to it, must have believed that the defendant's lot, No. 11, did not range with the other lots in the concession, but for some unaccountable cause receded farther north than the lots right and left of it. Probably the jury were led by that circumstance to doubt the accuracy of the evidence respecting the alleged original post. At any rate, as the plaintiff's evidence, if credited, supports the verdict, the effect of which is to give the plain-

tiff's lot the limit which it is right it should have, and which we must suppose was intended for it, we shall not disturb it upon any comparison of ours of the weight of evidence.

Then there remains the legal question raised at the trial, whether this action of trespass could be sustained in the name of the heir, who is an infant; or whether his mother, who sues as his next friend, and who is in actual possession of the farm, is not the person entitled to the damages for the alleged trespass.

We do not think that there is any difficulty on that point. The Real Property Act, 4 William IV. chapter 1, section 25, was referred to in support of the objection; but that (if it applies in any other manner than with reference to the Statute of Limitations) can only be meant to extend to cases where the brother or other relative of the heir is in possession, exclusive of the heir.

There is no legal impediment to the heir, though an infant, entering upon and being in possession of his own land; and he would not be less in possession because his mother lives also on the premises. And here the mother bringing this action on behalf of the infant, affirms his possessory title, and disclaims holding adversely.

The evidence given upon the trial does not shew the exact state of things as to the age of the infant, or whether his mother or any other person has or has not been appointed guardian under our provincial statute.

Generally speaking, in default of any appointment of guardian under the statute, the mother of an infant upon whom lands have devolved by descent from his father, would be guardian in soccage, and would have a right to make leases even of his land, and to bring ejectment and, as I suppose, of course trespass for injury to the estate; but such guardianship would cease at fourteen. Whether the heir in this cause was under or over that age when this action was brought, is not proved.

Per Cur.—Rule discharged.

DOE DEM. MURPHY V. MCGUIRE ET AL.

Verdict set aside on account of there being no proper Nisi Prius clause in the record.

Ejectment for part of village lot No. 1, according to Greely's survey of part of lot 1, 1st concession of Murray, on west side of the river Trent.

Verdict for the plaintiffs.

The defendant, by *Benson* his counsel, moved to set aside the verdict on account of defects in the *jurata* and *venire* in the Nisi Prius record, and on the law and evidence.

In the Nisi Prius record, after issue joined, nothing was perfect. The entry was of an award of *venire* to cause to come on the last day of ——— Term, in the year of our Lord one thousand eight hundred and ——— unless, &c. Then followed, "Afterwards, on the last day of ——— Term, in the year aforesaid, the jury is respited until the first day of ——— Term, unless the Honorable ———, her Majesty's justice, &c., shall first come on ——— day of ———, at Cobourg," &c.

ROBINSON, C. J., delivered the judgment of the court.

We think that the defendants having taken at the trial, at the proper time, the objection, that as this record was made up there was no proper authority to the judge to try, the cause was entitled to succeed on that objection; and that the rule for setting aside the verdict on the ground of irregularity must be made absolute.

We do not make the rule absolute on account of the defect in the award of *venire*, but for the want of any proper Nisi Prius clause, which is necessary in point of form to place the case under the cognizance of the judge at Nisi Prius, and which it does not properly rest with him to amend upon the trial.

Per Cur.—Rule absolute.

DEMPSEY V. DOUGHERTY ET AL.

Month's notice of action under 4 & 5 Vic.—when it expires.

Under the provincial act 4 & 5 Vic. ch. 26, sec. 40, a plaintiff who had served his notice of action on the 29th of December, and had brought his action on the 29th of January, was nonsuited—the court holding that the act requires a clear month's notice, exclusive of the first and last days.

Trespass and false imprisonment.

Plea: not guilty, by statute.

The warrant under which the defendants justified was clearly illegal; but there was an objection taken on the trial, that the action had been brought too soon before the month's notice of action had expired.

Notice of action was served on the 29th of December; the action was brought on the 29th of January.

The point was reserved as ground of nonsuit.

Verdict for the plaintiff, 7*l.* 10*s.*, subject to the exception which was taken in term by *Richards*, who cited 6 M. & W. 49; 12 A. & E. 72; 13 Jurist, 537.

ROBINSON, C. J., delivered the judgment of the court.

The point turns on the provincial statute 4 & 5 Vic. ch. 26, sec. 40, which provides that notice in writing of any action to be commenced against any person for anything done in pursuance of that act, shall be given to the defendant "one calendar month at least before *the commencement of the action.*"

This form of words is such as has been held in several cases to require a clear month, exclusive of the first and last days, and we therefore make absolute the rule for nonsuit.—*Young v. Higgon*, 6 M. & W. 49, is in point.

Per Cur.—Rule absolute.

SWORD V. CARRUTHERS.

Stoppage in transitu—Nature of action by defendant against plaintiff on bill of lading, Letters, &c., &c.

Held per Cur.—That the defendant upon the facts (as given at length below) had no right of set off against the plaintiff upon the common counts, or could support a plea of payment, or accord and satisfaction; but that if he had any remedy at all against the plaintiff, (and the court thought none existed) he should have brought a special action for negligence.

Semble also.—That in this case the defendant had not put it in the plaintiff's power to exercise any right of stoppage in transitu.

Assumpsit on common counts for goods sold and delivered, money paid, commission for agency, and for interest.

Pleas non assumpsit, except as to 105*l.* paid into court.

2nd. Payment of the 105*l.* into court.

3rd. Set off.

4th. Payment.

5th. Delivery and acceptance of 15,000 lbs. of cheese in satisfaction.

The plaintiff replied damages, ultra the 105*l.*

Issue was taken on all the pleas.

The plaintiff was a merchant, living in Greenock. The defendant lived in Kingston in this province. On the trial the plaintiff established a debt against the defendant for 762*l.* 5*s.* 1*d.*, and admitted payment on account to the amount of 382*l.* 5*s.* 1*d.*; and he claimed a verdict for the balance, 380*l.* 0*s.* 7*d.*

The defendant on his part set up a claim to be allowed a credit by the plaintiff of about 10,000 lbs. of cheese, shipped by the defendant to Scotland, and for which he claimed a right under the facts to hold the plaintiff accountable.

The defendant in 1847, being in Scotland, had made arrangements as he asserted, with Messrs. Smith & Co., of Glasgow, to settle for any goods which he might purchase there or in Greenock from other merchants, and informed the plaintiff that he had done so.

The plaintiff on his part seemed not to have assented to take his reference to Messrs. Smith, solely for payment, but proposed to take the defendant's draft on Messrs. Smith for goods supplied, leaving themselves the responsibility of both.

In July, 1847, Messrs. Smith agreed in writing to take of the defendant 10,000 lbs. of cheese at 6½*d.* currency per lb. free on board at Gananoqui, in Upper Canada, and (they say in this agreement) in consideration of the above 10,000 lbs. of cheese, "we hereby agree to settle for goods bought by Mr. John Carruthers (the defendant) here or in Greenock."

On the same day the defendant signed an agreement with Messrs. Smith to ship to their address and in good order,

10,000 lbs. of cheese, and to charge the same at 6½d. currency per lb. free on board at Gananoqui. The above goods to be shipped on or before the 1st of October, 1847.

On the 26th August the defendant, being still in Scotland, writes to the plaintiff, from whom he had ordered some goods, telling him that he had sold to Messrs. Smith 10,000 lbs. of cheese, which would come to about 200*l.*—that they had settled some orders for him in Glasgow, and he asked plaintiff to give him his opinion of Messrs. Smith, as he might have further transactions with them. He tells them also that Messrs. Smith will accept to the amount of the cheese, that he would not like to be under any obligations to them, and would put the matter in any shape the plaintiff might think proper.

On the 31st of August the plaintiff writes to the defendant that he had sent his invoice of goods furnished to the defendant to Messrs. Smith, but had not heard whether they would accept or not; and that it would be as well that the defendant should draw on them in the plaintiff's favour, or give the defendant's own bill at the Greenock bank for the amount.

On the 9th of October, 1847, the defendant writes to the plaintiff from Kingston, to which place he had returned, and apparently in answer to a letter of the 15th September, from the plaintiff: "I am sorry there should be any misunderstanding between you and Mr. Smith. I will send the cheese to your care, so as you can use your discretion. You certainly agreed in the first place to accept Mr. J. Smith. The cheese will be shipped in the course of the week. Mr. Smith wrote me by the mail, and he is very sore on the subject; I have advised him that the cheese will be sent to you."

On the 30th of October, 1847, plaintiff writes to the defendant in answer: "You do not mention what vessel you are to ship the cheese by, nor whether you insure, or if I am to do it, I see no cause for Mr. Smith feeling sore in the matter."

November 2, 1847, the defendant writes to the plaintiff, sending an account headed thus: "Messrs. William Smith

& Co., 14 Carrick-street, Glasgow, to the order of Archibald Sword, Esquire, Greenock :

To John Carruthers, Dr.

To 47 casks cheese, &c.

To 47 boxes cheese, &c.

Free on board, £355 10s. 0d."

And he writes thus to the plaintiff:

"Above is a bill of cheese, shipped per the ship *Torrance*, from Montreal, bound to Glasgow, to your order. You will see that the cheese is insured, as there is no insurance for Atlantic freight on this side of the water. The ship will leave in the course of a day or two. You will please deliver the cheese to Messrs. Smith & Co., *they satisfying you for the same*. I owe them, say 64*l.* 1*s.* 5*d.*, of which amount there is 36*l.* 0*s.* 5*d.* due Mr. Coghill. See if he has got his pay. If they do not satisfy you about the cheese, deliver them the amount due them with proportion of expenses, and the balance will be sent you in cash in the course of next month for that unfortunate sugar affair."

The bill of lading sent with the cheese, was dated 11th November, 1849, and stated the cheese to have been shipped "to Messrs. W. Smith & Co., 14 Carrick-street, Glasgow; care of Archibald Swords, Greenock."

On the 2nd of December, 1847, the plaintiff writes to the defendant—"I am in receipt of your favour of 9th ultimo, with invoice of cheese per *Torrance*, but no bill of lading. Not having this, it may be doubtful whether I get delivery. Your remarks about the two accounts of 64*l.* 1*s.* 5*d.*, and 36*l.* 5*s.* 0*d.* will be attended to."

On the 31st of December, 1847, the plaintiff writes again to the defendant. "Referring you to my letter of the 2nd instant, I beg to inform you the *Torrance* arrived a few days ago, and I went to Glasgow to make arrangements with W. Smith & Co., about delivery of the cheese, but no bill of lading could be found. As W. Smith & Co. were named the consignees in the ship's manifest, I had to give an order on the owners to deliver them the cheese on the freight and charges being paid. W. Smith & Co. promised to pay me the proceeds, less their own claims and charges."

He adds that he had got the cheese insured at London (as directed before its arrival).

On the 4th of January, 1848, the defendant wrote to the plaintiff, acknowledging his letter of the 2nd of December, and says "I have a letter from Messrs. Smith, and they are very indignant with me for not keeping my word respecting the cheese; (and he sends to the plaintiff a copy of the contract between them respecting the cheese) I went to all the banks to get exchange to settle the balance, but could not succeed."

On the 9th of February, 1848, the plaintiff answers thus—"I was in Glasgow to-day, and called on Mr. John Smith, who has charge of the cheese, which he said was going off but slowly. *If they had been shipped at the time agreed,* (October) they would have come to a better market. I do not wish to interfere with your matters, but were the cheese mine, I would certainly get quit of them as soon as possible. They may lay over a considerable time if not sold before summer."

On the 15th May, 1848, the defendant writes to the plaintiff—"With reference to your remark about the balance in Mr. John Smith's hands, after paying himself, I inclose you the contract of the cheese, subject to your order, and will take no other settlement than the contract price." He requested the plaintiff to draw on him for the balance of account on their other transactions, "*allowing him the contract price for the cheese.*"

Upon this evidence the defendant at the trial contended that the plaintiff having allowed the cheese to pass into the hands of Smith & Co., must give him credit for the proceeds, relying upon the direction in his letters, as entitling him to expect that, and to claim a discharge for his debt to plaintiff to that amount, since the plaintiff chose to allow the cheese to go into the hands of Smith & Co. without receiving payment. In other words, he considered that the plaintiff must be regarded as having taken upon himself the chance of Messrs. Smith's solvency.

The learned judge ruled otherwise, considering that the defendant's letter and the bill of lading only gave authority

to the plaintiff to stop the cheese in transitu, in the exercise of his discretion—that the evidence did not prove payment, or accord and satisfaction arising out of this transaction, nor a set off; there being nothing to shew that Messrs. Smith did not receive the cheese on the contract, and were not solvent when they received it.

The jury on this direction gave their verdict for the plaintiff for the balance claimed, 380*l.* 0*s.* 7*d.*

Smith, Q. C., of Kingston, moved for a new trial, on the law and evidence, and for misdirection. *K. McKenzie*, of Kingston, shewed cause. The authorities cited were—*Abbott on Shipping*, 284, 275; 2 B. & Ad. 932; 4 Ea. R. 211; 3 E. R. 585; 4 M. & W. 775; 1 Lord Ray. 271; *Abbott*, 293, 455, 471.

ROBINSON, C. J., delivered the judgment of the court.

Upon the facts of this case, there is no doubt that the verdict which the plaintiff received at the trial was proper, being for the balance due upon his accounts against the defendant, without allowing credit to the defendant on account of the value or proceeds of the cheese.

If the circumstances had entitled the defendant to claim that amount against the plaintiff, there is no plea on the record which would admit it. It could not be held that the plaintiff had been actually paid that amount, for no part of it went into his hands; nor could the jury have found that he had received the cheese in satisfaction of the debt, for he did not receive one pound of it—nor, according to the evidence, had he it ever in his power to receive it, nor any intention of doing so on his own account if he could have done it. The plea of set off is only one of the ordinary kind; and it is plain that the cheese had not been either sold to the plaintiff, or its value in any way passed to his credit, or become available to him.

All that can be said is, that the defendant, in his correspondence, shewed a desire to avail himself of the plaintiff's vigilance and caution in collecting the price of the cheese from the Messrs. Smith, between whom and the plaintiff there was no privity in regard to the transaction. If, out of what was done, any right of action has arisen to the

defendant against the plaintiff, it must be a right to bring an action of a special nature for damages in not fulfilling his instructions, whereby he (the defendant) has suffered loss; and what loss he has suffered does not appear.

The Smiths were clearly the purchasers of the cheese from himself (the defendant), at a stipulated price. He sent it home consigned to them; it got into their hands; they are liable to him for whatever he can by his own transactions with them insist upon their paying. There is no proof that they are not perfectly solvent; but there seems to have occurred a difficulty between them and the defendant, in regard to the price which the defendant can claim. He had stipulated for $6\frac{1}{2}d.$ per pound, and they were entitled to have the cheese shipped in this country on the 1st of October. The defendant was more than a month behind his time; and it seems that the lateness of the arrival in consequence was a serious injury to the Messrs. Smith, from a change which had taken place in the home market. There is nothing in the correspondence, or in the nature of the transaction, which can entitle the defendant to throw upon the plaintiff the burthen of contesting with the Messrs. Smith the legal consequences of the defendant's alleged failure in his agreement, nor anything which should enable the defendant to escape those consequences by assuming the right to hold the plaintiff liable to him personally, either for the contract price of the cheese, or for that price subject to any yet unascertained deduction. The defendant had made his own arrangements with the Messrs. Smith; he had proposed to the plaintiff to treat the Messrs. Smith as the persons on whom he had to rely for payment of what the defendant was procuring from him. But the plaintiff cautiously and most justly declined looking to the Smiths' credit exclusively: he would take their acceptance, he said, of the defendant's bill on them. There was no reason why he should do more; and certainly there was no reason why he should be asked to make himself a party to transactions as between the defendant and the Messrs. Smith, otherwise than in the performance of any agency which he might assume. He had no control over either of

them, and the circumstances shew he had no control over the cheese in question.

The defendant relies on his own letter of the 30th of October, 1849, to the plaintiff, in which he says:—"You will please deliver the cheese to Messrs. Smith & Co., they *satisfying you for the same*," and in which he intimates that the plaintiff is to take charge of the cheese, and sell it, and credit the proceeds, if the Smiths do not satisfy him. If the cheese had actually come into the plaintiff's hands under those instructions, then the defendant would have a fair right to complain if the plaintiff had thoughtlessly allowed it to go to the Messrs. Smith without securing payment; but even then, it would be no injury to the defendant that he had not in consequence received his full contract price; because we cannot hold that, failing as he did on his contract, he was in a condition to insist on that. For the value of the cheese, he could have recovered, of course, from the Smiths, and would have lost nothing by its going into their hands, unless they had become insolvent. And at any rate, his remedy against the plaintiff, if he had one, could not, as I think, have been by treating him as the purchaser of the goods, or as directly undertaking to pay him the value.

But the fact was, that there was no negligence on the part of the plaintiff, nor a failure to do anything that he had promised to do. If the defendant meant to give him the absolute control over the cheese on its arrival, he should have taken care that it went properly consigned to him, or—as is common in such cases where the article is yet to be paid for—should have shipped the goods to be delivered to his own order, sending one part of the bill of lading, unendorsed, to the Messrs. Smith, to notify the shipment, and another, endorsed, to the plaintiff, as his agent, to be delivered to the consignee when the goods should be satisfactorily arranged for.

Instead of this, he sends no bill of lading to the plaintiff, but does ship the cheese, consigned to his vendees. The plaintiff, as he reported (and the contrary is not shewn), could not obtain the possession of the goods, though he

endeavoured to do so, and they passed into the possession of the vendee, to whom they were shipped—the words in the bill of lading, “to the care of H. Sword,” not in fact enabling the plaintiff to get them into his possession, though he was willing to have assumed an agency which the defendant, merely of his own suggestion and for his own convenience, had thrown upon him.

The defendant's case amounts only to this—that he complains of being injured (but, for all that appears, may not have been injured) by the plaintiff not having exercised on his behalf a right of stoppage in transitu which the defendant had not put it in his power to exercise, and his failure in which, if he had put it in his power to exercise it, would have constituted no defence upon these pleadings to the plaintiff's action for the amount of his own dealings with the defendant, which were wholly unconnected with this transaction.

Per Cur.—Rule discharged.

DOE DEM. ANGUS McDONELL V. RATTRAY.

What occupation will give a title by a twenty years' possession—Competency of witness under 12 Vic. ch. 70—Ejectment.

To enable the Statute of Limitations to operate in bar of the true title to land, there must be an *actual* occupation to the exclusion of the real owner. Where therefore a party, having permission given him to occupy the west half of the lot, did confine himself so far as residence and cultivation went to that half, and only committed depredations on the other half; it was held, *per Cur.* that he could not be considered as having had exclusive possession of both halves. *Semble*—That the payment of taxes in itself signifies nothing in making good a title under a twenty years' possession.

Since the passing of the act 12 Vic. ch. 70, A., who has been sued in ejectment and allowed judgment to go against him by default, is a competent witness in favour of B. bringing his ejectment for the same lot, and relying upon A.'s evidence to prove that notwithstanding his (A.) possession, B. was the party who had the legal title. *Semble*—That the exception in the statute 12 Vic. ch. 70, excluding the testimony “of the person in whose *individual behalf this action was brought*,” applies only to those cases where the plaintiff is only a nominal plaintiff, and the witness the person beneficially interested in the subject matter.

This action was brought by Angus McDonell, the lessor of the plaintiff, as heir-at-law of his father Angus McDonell, of Charlottenburgh, to recover the east half of lot No. 10, in the sixth concession of the Township of Kenyon.

The whole of lot No. 10 was granted to Angus McDonell deceased on the 1st March, 1803, and he died intestate

about forty years ago, leaving the lessor of the plaintiff, his eldest son and heir, and another son, John, living.

At the time of the old man's death lot No. 10 was still wild land. The lessor of the plaintiff gave to his brother John the west half of lot No. 10, and John went to live upon it in 1815. It was said that he made a conveyance of the west half to John, but it was not produced, and John lived upon the west half till about eleven years ago, when he moved to the east half, and made a clearing and built a house thereon. Angus retained the homestead property in Charlottenburgh, and never was seen at his brother's in Kenyon more than two or three times during the whole time that John lived upon the lot, until the difficulty arose just before the commencement of the present action. John had mortgaged the west half of the lot and was deprived of the possession, and then he moved to the east half. After residing there for nearly eleven years he became farther involved, and a judgment was obtained against him, upon which an execution against lands was issued, and the east half of the lot was sold as his land, and at the sheriff's sale the defendant became the purchaser. The defendant brought an action of ejectment against John, and served the declaration upon him, but John made no defence, though just before the sheriff executed the *habere facias* Angus was sent for to proceed to Kenyon and assume possession of the east half. He did go there, and was there when the sheriff executed the writ, but it did not appear that he either did or said much at the time the defendant obtained the possession, except claiming it to be his when the writ was executed.

Angus now brought this ejectment against the defendant, and the question at the trial was—whether John had acquired title to the east half of the lot by adverse possession?

The defendant contended—though John did live on the west half, yet that he exercised acts of ownership over the east half inconsistent with the idea that it remained the property of Angus, and that Angus himself must be supposed to have given him the whole lot instead of the half only, and therefore that John had acquired title.

On the other hand, the plaintiff contended—that though

some of John's acts might be inconsistent with the fact that he, Angus, never intended to give him more than the west half of the lot, yet that he was not aware of such acts, and that John's possession was confined to the last eleven years, and therefore he had not lost his right to bring his action.

At the trial it was shewn that the clearing made by John originally was not very exact, and that part of it was somewhat on the east side of the centre, though when the clearing was made probably it might not have been intended to go further than the centre; the clearing was zig-zag, and the road which John used was on the east part of the lot; from the time John went on the west half he cut and sold timber from the east half as well as the other; and it was shewn that in 1827 he paid taxes for the whole lot in his own name, and continued to give in to the assessor of the township the whole lot in his own name, never telling that it was his brother's, or saying that he paid the taxes for him. It was shewn that the east side of the lot was low and wet and the west higher and dry, in order to draw the inference that when John first settled upon the land he preferred the west side to the east, because of its better situation. Angus was not aware that John was living on the east half until some one sent for him to come and assume possession, in order to prevent possession being delivered to the defendant. John was called and admitted as a witness on the part of the plaintiff, to explain that he never had in truth from his brother more than the west half, and though he did cut timber on the east half, yet that his brother forbid his doing so, and that he paid the taxes by his brother's directions, of which his brother had repaid him a part.

It was objected at the trial that John was not a competent witness for the plaintiff, because he was the debtor in the judgment mentioned and in possession of the land at the time of the sheriff's sale, and that the declaration of ejectment at the suit of the defendant was served upon him, and judgment by default obtained against him, and that he was the party dispossessed by the sheriff when executing the writ.

Upon the evidence the jury found for the lessor of the plaintiff.

McDonald, Solicitor General, obtained a rule for a new trial, the verdict being contrary to law and evidence, and for the reception of improper evidence. He referred to the following authorities:—4 Wm. IV. secs. 17, 26, 27, 37; 2 Smith's Leading Cases, 437; 12 Vic. ch. 70.

Brough shewed cause, and cited 3 U. C. R. 487, 494; 1 C. & M. 648; 6 M. & Gr. 307; 13 Jurist, 123.

ROBINSON, C. J., delivered the judgment of the court.

The first question is upon the admissibility of John McDonell as a witness. It is objected, that notwithstanding the statute 12 Vic. ch. 70, he was not a competent witness. He must be a good witness since that act, unless he comes within some express exception contained in it. It is not suggested that he does, unless the exception of being *tenant in possession of the premises in question* in the action can be held under the circumstances to apply to him. We think we cannot hold that it does. When the statute has gone so far as to provide, on the general principle, that no person shall be excluded from giving testimony by *any incapacity from crime or from interest*, however base the crime and however direct or important the interest may be, it would seem absurd so to extend the construction as to allow any interest to affect the competency which does not come within one of the very exceptions contained in the statute.

The case in this court of *Doe dem. Perry v. Henderson* (a) was cited, as bearing upon the question of the admissibility of this witness. So far as reasoning upon the principle of the exclusion contended for can be material there is a similarity in the cases which would make it material for us to revert to that decision, but as that case arose before the statute 12 Vic. ch. 70, which has made so very great a change in the law on this point, it is of little consequence what was decided in it.

This witness, John McDonnell, at the time of the trial was not tenant in possession, nor did he defend the action as such. A verdict for the defendant cannot by its operation confirm him in any advantage or bestow any on him.

(a) 3 U. C. Rep. 494-5.

It is suggested that a verdict for the plaintiff might, because it is most probably well understood between him and his brother, the lessor of the plaintiff, that if the latter succeeds in this action and turns out the defendant, then John McDonell and his family shall be at liberty to resume possession of the premises in dispute. That may be so ; and in that respect it likens this case to that referred to of Doe dem. Perry v. Henderson, but that is plainly resting the objection on a ground distinct from the exception of his being the actual tenant in possession—it is a mere suggestion of a state of things likely to create a bias, and induce a corrupt perversion of truth ; but the legislature has thought it safe to disregard any exception of that kind, and to look only to two or three defined legal relations to the cause as affording fit grounds for exception, and this is not one of them.

It may be contended (though I did not observe that it was on the argument) that the witness came within the last exception, in the act of being *the person in whose individual behalf this action was brought*. I take it that applies but to cases where the plaintiff is only a nominal plaintiff, and the witness the person beneficially interested in the subject matter.

For all that appears, the legal title is in the lessor of the plaintiff, and we have no right to say that he is not asserting it on his own account, whatever privilege in regard to possession he might choose to allow to his brother, in case of his succeeding.

Then, as to the merits of the case upon the evidence—we cannot say that the verdict is wrong. I think, on the contrary, that it was consistent with the weight of evidence, though some of that evidence may be subject to the suspicion of bias from interested motives. There is some testimony to shew that the lessor of the plaintiff, who no doubt had the title at one time in the whole, as heir of his father, made a deed of the west half only to his brother John. On that point the evidence is not clear, and the doubtful point is, whether he did not in fact consent to his brother having the whole lot. The jury have believed from the testimony that he did not, and there is a good deal to warrant them in so finding.

Then if John had not the plaintiff's permission to occupy the whole lot, but had claim only to the west half, we cannot extend his possession by construction over the east half, on which he was not living twenty years ago, merely because he had committed occasional acts of trespass in cutting timber. It must be an actual occupation, to the exclusion of the true owner, which enables the statute to operate in bar of the true title, and such bar will only apply to the part of the property occupied. The paying taxes signifies nothing. If he was residing on part of the lot under a title valid or otherwise to the whole, so that we could clearly see he was claiming the whole, the case would be different; but if having permission only given to him to occupy the west half, he did confine himself to that half, so far as residence and cultivation went, and only committed depredations as a stranger might do on the other half, we cannot hold him to have had exclusive possession of both halves.

We think the verdict not unsupported by the evidence, and that the rule must be discharged. If the defendant is so advised, he can bring a new ejectment.

Per Cur.—Rule discharged.

PATTERSON V. REARDON.

Damages in an action for mesne profits—How far in the discretion of the jury.

In an action for mesne profits, the jury gave a verdict for nominal damages, and the court were moved by the plaintiff to set aside the verdict as perverse and contrary to law. Evidence was given at the trial that the defendant had made substantial improvements on the lot from which he had been ejected, and there was also evidence of the costs of the ejectment suit; but *held, per Cur.*, that the damages were in the discretion of the jury, and that the damages and costs of the ejectment might be considered as paid for by the improvements—and the rule was discharged.

Trespass for mesne profits. Pleas—1. Not guilty; 2. The land not the plaintiff's.

The plaintiff's right to recover was fully admitted, and that the defendant has been about six years in possession of the premises, a town lot in Chatham.

Damages for occupation were not pressed by the plaintiff's counsel, but he desired to recover the costs of the ejectment in which the plaintiff had recovered by default, being about 13*l*.

It was proved that the defendant had occupied only a part of the lot and had built upon it; his improvements in building were of a substantial kind, and were valued at 175*l*.

The plaintiff now lets the premises at 25*l*. a-year to the defendant himself. There was some evidence that the plaintiff's attorney, when he obtained possession, held out the hope that the plaintiff would not exact costs.

The jury disallowed costs and gave but nominal damages.

J. H. Cameron obtained a rule for a new trial on the law and evidence, and on the ground that the verdict was perverse. *D. B. Read* shewed cause. The authorities cited were—2 T. R. 261; *Sedgwick on Damages*, 125; *Draper's Reports*, 6.

ROBINSON, C. J., delivered the judgment of the court.

We are asked to grant a new trial (the amount of costs claimed being only about 13*l*.) on the ground that the plaintiff's right to recover the costs was so clear that the verdict of the jury giving only nominal damages was perverse.

Unless we should be right in holding this to be so, we ought not to set aside the verdict, for the amount is too small to make it right that we should allow the plaintiff a new trial when the verdict is already in his favor, if we can only do so on payment of costs.

That the defendant may give in evidence the fact of his having made substantial improvements is settled. In *Lindsay v. McFarlane* (*a*), in this court, we so decided, and there are authorities which fully support that decision; but it seems to be supposed that the costs of the previous ejectment constitute a demand of that character—that they must at all events be paid by the defendant, and cannot be reduced or not, as the other damages may, by setting off the value of permanent improvements.

In *Gulliver v. Drinkwater* (*b*), they were not so regarded by the court. There the defendant in the action for mesne profits had allowed judgment to go by default, and in assessing damages the jury disallowed the costs, but the court refused to set aside the assessment on that account,

(*a*) *Draper's Reports*, 6. (*b*) 2 T. R. 261.

saying that it was an application to the discretion of the court, and that although the jury might, if they had pleased, have given the costs of the ejectment as consequential damages in their verdict in the action for mesne profits, yet they were not bound to do so, and they refused to interfere. The reason for which the costs were disallowed in that case, or rather for which the court declined interposing, was not one which can apply to the case now before us, but it was not so strong a reason, for if the court or the jury have any discretion in the matter, it cannot be exercised in the defendant's favor upon any more solid ground than because the occupation of the land, instead of being an injury to the proprietor has in truth been greatly to his advantage.

The costs can be nothing more than a part of his damages, and if after taking the costs and every thing else into account, he has sustained no damage, we cannot hold the jury perverse in giving him no more than a shilling, for they were upon their oaths, and the whole question of damage was open to them, of which the costs formed a part.

Per Cur.—Rule discharged.

BANK OF UPPER CANADA v. MURPHY.

Right of the execution creditor, after debt paid on fi. fa. lands, to assist sheriff's vendee under circumstances of hardship, by consenting to issue an alias fi. fa. against debtor's lands.

Where the execution plaintiff had *been paid his debt in full in 1840* by the assignee of the sheriff's vendee of land, sold under a *fi. fa. lands*, the court set aside an order in chambers (upon facts mentioned below) obtained by the attorney for the assignee, and as if at the instance or with the consent of the execution creditor, for the issuing an *alias fi. fa. lands* in 1849 against the execution debtor, *holding* that it was not competent for the execution creditor, at that distance of time, to elect to consider his debt as unsatisfied, and to act upon the assumption that the person who paid it did not make the payment in privacy with his debtor.

In this case *Mr. Gwynne* obtained a rule to shew cause why the duplicate writ of *fi. fa.* against the lands of the defendant, issued on an order of Mr. Justice Sullivan, made in chambers on the 5th of April, 1849, and also the *alias fi. fa.* for residue against the lands of the defendant, issued in this cause, and all proceedings thereon, should not be set aside, with costs of the application in chambers for a stay of proceedings, and of this application.

It seemed that a *fi. fa.* in this suit against the defendant's lands, endorsed to levy 59*l.* 10*s.* 7*d.*, came to the sheriff (probably in 1834), under which, on the 25th of July, 1835, he sold the right of the defendant to the south half of 19, 13th concession of Cavan, to D. E. Boulton, Esquire, for 10*l.*, and returned no lands as to the residue; that Mr. Boulton relinquished his purchase to J. Brown, who paid off the execution to the Bank of Upper Canada, the plaintiffs in the writ, on the 15th of July, 1840; and that, nevertheless, on the 30th of April, 1849, an *alias fi. fa.* issued in this same suit against the defendant's lands for the residue after the 10*l.* endorsed to levy 115*l.*, besides certain fees and expenses.

Vankoughnet shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

There seems to have been a series of errors which have led to the adoption of this proceeding. The crown had granted to the defendant the west half of the lot. He, it is alleged, transferred to J. Brown or authorised Brown to transfer to any purchaser, in *his* name and for *his* benefit, the *south* half of the lot, meaning his half, which was in fact the *west* half. Brown, in consequence of this error, conveyed the *south* half to one Huston, whose assignees have been living on and improving the *west* half, following rather the intention than the terms of their title; then, falling into the same mistake, the sheriff advertised for sale in 1835 the *south half* and conveyed that to the purchaser, D. E. Boulton, who bid it off on behalf of these plaintiffs, and afterwards conveyed it to one Brown, on his undertaking to pay off in full the plaintiffs' judgment against Murphy, the defendant, which Brown did in July, 1840; then in 1846 or 1847 the defendant discovered the mistake that had been committed and brought ejectment against those in possession of the land to eject them, but their title to the south half covering necessarily the south-west quarter at least, the defendant could not in his ejectment recover more than the north-west quarter.

In order to prevent his disturbing the assignees of Huston and of Brown, in respect to that quarter to which, in con-

sequence of the blunder in describing the half lot, they could make no title, the attorney for the defendant in that ejectment, (G. S. Boulton, Esq.) in 1849 applied to Mr. Gamble, the solicitor for the Bank of Upper Canada, to be permitted to take out and enforce execution against the lands of the defendant Murphy, for the residue of their debt which had not been made by the sale in 1835, but which residue had been paid to them in full by Brown in 1840, and he desired to be allowed to do this with the concurrence of the bank, for the benefit of the present owners of the north-west quarter of the lot 19.

Whether the solicitor for the bank did assent to this being done he does not himself state. It is denied that the bank ever gave authority or consent to such a proceeding, and it is not shewn that they did. If their solicitor had expressly sanctioned such a proceeding, it could not have bound the bank, for he had no authority to take such a step of his own accord in their name nine years after they had been paid their debt. On these facts, it is quite clear at least, that the court should not have been asked to sanction the issuing of an execution in 1849, as if at the instance of the bank and for their benefit, nor without a full explanation of all the facts as they now appear, when the court would have known what they were doing, and would have determined to grant or withhold their aid to the proprietors of the land in question, as they might, on a view of the circumstances, have deemed right.

We consider that the bank, having been paid their debt in full in 1840—not by any person who purchased the judgment from them, and not, as appears, upon any understanding even between them and the person paying the debt that he was to be allowed to enforce the execution in their name for his benefit—it could not be competent to them at this distance of time to elect to consider their debt as unsatisfied, and to act upon the assumption that the person who paid it did not make the payment in privy with their debtor. Great inconvenience and injustice might in some cases be occasioned by such a proceeding, from the death of witnesses or loss of documents disabling the defendant

from shewing the truth, and after large improvements had been made by others on the estate.

Per Cur.—Rule absolute.

ELLIOTT V. WILSON ET AL., EXECUTORS OF ROBERTSON.

Rule of Court No 23, Hilary Term, 13 Vic.—As to assessing contingent damages where nothing on the record but demurrer to declaration.

A plaintiff cannot under the 23rd Rule of this Court, made in Hilary Term last, assess contingent damages, where there is nothing on the record but a demurrer to the whole declaration.

Assessment, common counts—1. For work and labour ; 2. On account stated, laying promise in both by testator ; 3 and 4. Counts for work and labor and on account stated in time of testator, laying promises by the executors.

Pleas—1. An outstanding mortgage by testator to Thomas J. Cottle, which was demurred to, being, as it seemed, badly pleaded.

2. A number of outstanding judgments against the defendants, as executors also, which plea was also demurred to.

No issues in fact, but nevertheless contingent damages were assessed at 34*l*.

The defendant, by his counsel, moved to set aside the assessment as irregular.

The plaintiff supported it under the construction which he gave to the 23rd rule of this court, made in Hilary term last.

ROBINSON, C. J., delivered the judgment of the court.

The 23rd rule was never intended to have the effect of allowing a plaintiff to take down his cause to the assizes to assess contingent damages on demurrer, when there is no issue of fact joined between the parties, and when consequently the convenience of *unica taxatio* does not apply, which has given rise to the practice of assessing contingent damages.

Our rule is in this part of it precisely like the English rule of Hilary term, 2 Wm. IV., which has never, that we can find, been considered to admit of the practice which has been pursued in this case ; and there is added in ours a provision not contained in the English rule, and which seems to us to shew clearly that it could not have been intended by the rule to allow of contingent damages being

assessed, when there is nothing on the record but a demurrer to the whole declaration. It would be an inconvenient practice.

In this case it was suggested by the plaintiff's counsel that the assessment could at any rate be supported, if not upon the demurrer, yet because the pleas demurred to are such as to entitle the plaintiff to judgment of assets *quando*; but it was not upon that footing the cause was carried down—no proper entries were made on the record for such a purpose. The plaintiff has not taken judgment upon the pleas, but has distinctly gone down to assess contingent damages on the demurrer.

Per Cur.—Rule absolute.

DOE DEM. S. JACKSON AND C. GARRRION V. WOODRUFFE.

Deed of bargain and sale made by an infant, whether void or voidable?—What effect the bringing of an ejectment by the infant has on the deed?

A deed of bargain and sale made by A., when an infant, is not absolutely void, but voidable by him either before or after he comes of age. The bringing of an action of ejectment by A. to regain possession of the land, contrary to his deed, is so complete an avoidance of the deed, that it cannot afterwards be confirmed or set up by any subsequent deed or act of A.

Ejectment for land in the township of Niagara.

Verdict for plaintiff.

It is unnecessary to state at large the facts of this case, which has already been before the court. The jury on this trial found that Joseph Jackson, the eldest son of the former owner of the land, was a minor when he made the deed to the defendant, under which the defendant made title at the trial; they found also that Jackson, the father, made a will devising the land to his sons Joseph and Stephen, as tenants in common, and as Joseph died intestate and without issue, the lessor of the plaintiff, Stephen Jackson, must either as heir or devisee have been seised of the estate. Then it was found further by the jury, that at the time of his making a deed to this defendant of the premises in question in this action, viz., in March 1842, he was under age, and the defendant must therefore have failed in resisting a recovery on the demise of Stephen Jackson, if it had not been that on the 5th of September last, a very few days

before the trial, Stephen Jackson executed a deed of bargain and sale, whereby for a pecuniary consideration expressed he granted, bargained and sold these premises to the defendant in fee. The jury found that he made that deed advisedly, and that it was not obtained from him covinously or by any other undue means. There could not be a verdict for the plaintiff on the demise by Garrion, because the deed produced and proved from Stephen Jackson to him, which was prior to 5th September, 1849, did not cover the premises now in dispute, though it may have been intended to do so.

The finding of the jury on the several points in the case was borne out by the evidence, and after a long investigation the case was at last narrowed down to this legal point, viz., whether the deed given on the 5th of September, 1849, by Stephen Jackson to the defendant could have the effect of confirming the deed before given by him to the defendant, when he Stephen Jackson was a minor.

If it could, then it was contended that the defendant must be looked upon as being legally seised from March, 1842, and he would be entitled to have a verdict entered for him; but if this late deed could not operate as a confirmation of the other, then it was contended that the plaintiff must have a verdict, having the title at the time of the demise laid and after issue joined in the cause.

The defendant, by *Cameron, Q. C.*, obtained a rule *nisi* to enter non-suit or a verdict for him, on leave reserved at the trial. The cases cited were—3 Y. & C. 586; 11 M. & W. 256; 3 M. & S. 477; 2 Inst. 673; Bac. Ab., Infants I. 8; Bing. Infancy, 249.

ROBINSON, C. J., delivered the judgment of the court.

We consider that the deed of bargain and sale made by Stephen Jackson, when he was an infant, was not absolutely void, but voidable by him either before he came of age or after; that he did avoid it most unequivocally when he brought this action to regain possession contrary to his deed, and that having so avoided it, he could not by any subsequent deed or act of his set it up again. We think therefore that the plaintiff is entitled to the postea.

If the infant had not so clearly repudiated the first deed, by bringing ejectment, I should still have doubted whether what was done on the 5th of September could be properly treated as a confirmation of it, and whether it was not rather an avoidance, though it is true that the defendant's attorney, who was employed by him in negotiating that transaction, was careful to insert words of express confirmation in the second deed. The transaction of 5th September was in effect an independent purchase. Stephen Jackson refused what was first offered to him, and asked even more than was at last paid, though the sum which he did accept, and in consideration of which he made the deed, was much beyond what had been given to him for the deed which he had executed when an infant. Nothing could be clearer than his refusal to abide by that first contract, and though the second deed professes on the face of it to be a confirmation of what was done in 1842, it was really in effect an avoidance of it—a new contract, inconsistent with the other.

On the other hand, it might be said that the defendant might be permitted to give him a consideration for confirming his first deed, and that such was the effect and intention of the second deed, though it would seem hardly probable that Stephen Jackson could have so understood it, for it would have been an absurd act in him to have thus thrown upon himself all the costs of this ejectment, in which he must otherwise have succeeded, and which was then on the eve of being tried.

It was not made a point at the trial whether the conveyance which Stephen Jackson had after his full age made to Garrion did not operate as an avoidance of the deed made while he was an infant, for though by reason of an erroneous or imperfect description of the land it did not pass his estate in these premises, yet no doubt it was his intention by that deed to convey this land, and if that intention plainly enough appeared, it would operate as an avoidance of the first deed.

However, the case is in our opinion clearly with the plaintiff on the first ground—namely, that by bringing this

ejectment he avoided the first deed, and could not afterwards ratify what he had made void.

Per Cur.—Postea to plaintiff.

DOE DEM. CAMERON V. ROBINSON ET AL.

Fi. fa. lands—When a seizure under it must be considered as abandoned—Sale of a reversioner's interest during the lifetime of a tenant for life.

The sheriff on the 15th of April, 1835, received a writ of *fi. fa.* against lands, and on the 10th of May, 1836, he sold some of the defendant's lands under it: other portions of the land, though included in the sheriff's advertisement published previously to that sale, were not sold. There being no adjournment of the sale, or any postponement from time to time, or any new advertisement, the sheriff, in December, 1838, suddenly takes up this old writ issued in 1835, and proceeds to sell under it the lands unsold in 1836: but held *per Cur.* that the seizure under the writ of 1835 must be considered as abandoned, and the sale of 1838 void.

The interest of a reversioner may be sold under a *fi. fa.* lands during the lifetime of the tenant for life.

Ejectment for the rear half of the west half of lot 7, in the fourth concession Cornwall.

By consent of parties the jury gave their verdict for the plaintiff, subject to any legal questions to be raised by the defendant upon the evidence.

The plaintiff put in evidence an exemplification of a judgment in a case of Shuter and Wilkins v. Robertson Brown, Donald Brown and Duncan Brown, entered 10th May, 1834, also an exemplification of *fi. fa.* against goods and one against lands.

To the *fi. fa.* against lands the sheriff had returned—made of the lands of Donald Brown and Duncan Brown 49*l.*

And a deed was produced and proved from the sheriff of the Eastern District, made the 11th of January, 1839, to the lessor of the plaintiffs, for lots 7 and 8, in the fourth concession Cornwall, sold as the lands of Robertson Brown, Donald Brown and Duncan Brown, and it was recited in the deed that the land was sold by the sheriff on the 4th of December, 1838.

It was admitted that John Brown, father of the three defendants in the judgment, died in possession of the premises in question on the 14th of February, 1835, leaving these three sons and another son, John Brown. He made

a will, devising to his wife for her life the north half of this lot number seven, and the remainder to Donald and Robertson Brown, his sons, in fee.

The wife, Elizabeth Brown, died in 1837, and Donald and Robertson Brown died soon after her, in December, 1837.

It appeared that the *fi. fa.* against lands issued on the 7th of April, 1835, and was received by the sheriff on the 14th of April, 1835.

The deputy sheriff was called by the defendants as a witness, and he swore that on the 10th of May 1836 he sold under the *fi. fa.* against lands the east half of 13, in the eighth concession of Cornwall, for 50*l.*: that on the 4th of December, 1838, a second sale took place of lot 7, in the eighth concession of Cornwall (including the land now in question), to D. E. McDonell for 49*l.*, to cover a balance which remained due on the execution after the sale of 10th May, 1836. He stated that *all* the lots had been advertised in the "Upper Canada Gazette," on the 7th of April, 1836, under the *fi. fa.* produced, having been previously advertised in the district. The lots had been advertised to be sold on the 30th of April, 1836, but the sale was postponed it seems to the 10th of May, when the other lands were sold, and then afterwards, as it appears, the same writ was taken up again and the land now in question sold on the 4th of December, 1838. It was not shewn that there was any postponement of sale from the 10th of May, 1836, nor that by advertisement or otherwise anything was done to keep alive the writ of *fi. fa.* The deputy sheriff stated that he did not know who was in possession of this land when he sold on the 4th December, 1838, nor did he explain why he did not sell this land on the 10th May, 1836, nor how he came to take up the writ and act upon it again after so long an interval. It might be that the sheriff supposed in May 1836, when he sold the other land, that he could not then sell this land, because the widow, who was still living, had a life estate in it. She died, it seems, before December 1837, but still he did not sell before December 1838.

J. Lukin Robinson for the plaintiff; *P. M. Vankoughnet* for the defendant. Cases cited—1 U. C. R. 195; 6 U. C. R. 336.

ROBINSON, C. J., delivered the judgment of the court.

The case of *doe dem. Young v. Smith* in this court (a), was in some respects like the present, although the interval was longer between the reception of the writ by the sheriff and his acting upon it, and there was in that case the additional circumstance of the sheriff who received the writ having ceased to hold office long before he proceeded to sell; but although the circumstances are not so strong in this case to invalidate the sale, they are so strong that we think they were equally conclusive.

The sheriff receiving the writ on the 14th of April, 1835, sold on the 10th of May, 1836, some lands of the defendants. At that time the defendants in the *fi. fa.* were entitled to the reversion in fee in the land now in question after the death of their mother, who was then living.

For some reason wholly unexplained at the trial, though this land was included in the sheriff's advertisement published previously to that sale, it was not sold. No proof was given that anything further was intended to be done under the writ than was done at the sale made under it in May 1836—no evidence of any adjournment of the sale, or of any postponement from time to time, nor of any new advertisement.

In 1837 the widow died. I dare say the sheriff had supposed he could not sell the defendant's reversion so long as she lived—that he could only sell an actual estate in possession. In December 1838 he suddenly takes up this old writ issued in 1835, and, after an interval of more than two years and a half from the sale already made, he proceeds to sell these lands.

We consider that he could not legally do this, that he must be considered to have done in 1836 all he intended to do under the *fi. fa.*, and that he had abandoned any seizure he could be held to have made before that time of the land

(a) 1 U. C. R. 195.

now in question, and that the *postea* should go to the defendants.

Per Cur.—*Postea* to the defendants.

MORTON AND MCGHEE V. McDOWELL.

Trover—What the measure of damages?

In an action of trover the general principle of law (though not an inflexible one) is—that the jury can give no more in damages than the value of the goods at the time of the conversion. Where therefore logs had been taken to the defendant's mill and sawed there, and the plaintiff, acting under a *supposed claim* of right, refused to deliver them to the defendant: It was *held per Cur.*, that the plaintiff was not entitled to the value of the logs in the state of sawed lumber, or to an expense incurred in sending a steamer and barges for the lumber.

The plaintiffs sued in trover for a quantity of saw-logs and lumber of various kinds, laying special damage from loss of time in endeavouring to recover them, hire of steamers and *servants*, loss of profit, &c.

The defendant pleaded "not guilty." 2ndly. The plaintiffs not possessed, &c.

At the trial the plaintiffs gave sufficient evidence to shew the property theirs, by purchase from one Burney, who had owned the logs.

The defendant gave, on the other hand, such evidence as raised a doubt upon the question of property, which was left to the jury, and decided in the plaintiffs' favor.

The logs had been taken to the defendant's mill and sawed there, and the plaintiffs, after they had knowledge of that fact, and little if any reason to suppose that the defendant would consent to give up the lumber to them, which had been made out of the logs in question, took a steamer and two barges to carry it away, but the defendant had the sawed lumber rafted, and refused to let the plaintiffs take it or more than a small part of it.

The plaintiffs contended that they were entitled not merely to the value of the logs before they were sawed by the defendant, but to their value in the state of sawed lumber, and also that they should be compensated in damages for their expenses in taking the steamer and barges for the lumber which they failed to get. The jury assessed the value of the plaintiffs' timber before it was sawed at 18*l.*,

and valued it as sawed lumber at 30*l.*, deducting the cost of sawing; and they estimated the plaintiffs' expenses incurred in going for the lumber at 15*l.*

It was agreed at the trial that the verdict should be taken for 18*l.*, with leave to move to increase it to 30*l.* or 45*l.*, according to the opinion of this court upon the respective claims.

Richards moved upon the leave reserved to increase the verdict, and cited Sedgwick on Damages, 507; 10 Jurist, 311; 7 C. & P. 804; 1 C. & P. 625; 2 M. & Gr. 326. *Gildersleeve* shewed cause: He cited 3 Campb. 477; 15 L. J. 219, Q. B.

ROBINSON, C. J., delivered the judgment of the court.

We have considered the questions submitted to us in respect to the two sums claimed by the plaintiffs, in addition to 18*l.* which has been unconditionally given by the jury, and our opinion is that the verdict should not be increased beyond the 18*l.* It is not an inflexible rule that the jury can give no more in damages than the value of the goods at the time of the conversion, though that is the estimate by which they should be governed as a general principle, when there is nothing special and unusual in the case.

But we are asked here to determine that the plaintiffs are legally entitled to damages which would be more than double the value of the article converted, and we think we cannot hold that they had a legal claim to receive as of right either of the sums in question.

If the jury had given a verdict for something beyond the value of the logs, without specifying on what ground they allowed it, and if we had been asked to set aside their verdict on the ground that the damages were excessive, then whether we should have interfered or not would have been a different question.

We cannot give it as our opinion that the plaintiffs had a legal claim to the damages claimed in addition. The general principle of law is against it, in regard to both heads of claim; and if there might be cases when the particular facts would warrant such claims, we think this is not one of them. The complexion of the evidence is altogether

such as to leave ground for supposing that the defendant was not conscious of doing a wilful wrong, but acted under a claim of right, and not with a knowledge that he was taking the plaintiffs' timber.—3 Campb. 477; 7 C. & P. 804; 1 C. & P. 625.

Per Cur—Postea to the plaintiffs for 18*l*.

WHITE v. STEVENS.

Assignment of property—How far valid when the intention of both parties was to defeat an expected execution.

Semble—That since the decision of Wood v. Dixie, (7 Q. B. R. 829), a *bona fide* transfer of property made by a debtor to a third party cannot be considered invalid, merely because the object of the sale, in the mind of both parties, was to defeat an expected execution. The rule in this case however was discharged on other grounds; and see the strong language of Robinson, C. J., expressing a hope that whenever it became necessary to decide here the point taken in Wood v. Dixie, the Court might not feel itself constrained to adopt such a view of the law.

This was a feigned issue, to determine whether certain goods and chattels which had been seized by the sheriff of the district of Victoria, under a *fi. fa.* issued in a cause of Samuel Stevens v. William Robins, were or were not the property of the plaintiff.

At the trial at Belleville, in October last, the plaintiff gave evidence of his having bought the whole of the property from Robins, and having paid him 72*l*. 5*s*. in cash and given a note to him for 2*l*. 15*s*. Two persons were called on to value the property at the time. They both said it was worth 75*l*. Robins left the country soon after the sale, which was made between the 6th and 9th October, 1848, the assizes that fall having opened on the 9th October.

The defendant impeached this sale, by proving that the plaintiff was a labouring man before that time, reputed to be of little means, while Robins was known to have money, and was also father-in-law to plaintiff; and by shewing that though Robins went away, his family remained behind and were living near the farm which Robins formerly occupied, and in the possession of which the plaintiff succeeded him; and by producing a *fi. fa.* in his favour against Robins, tested the 30th July, 1849, and received by the sheriff on the 6th August following, endorsed to levy, including costs,

127*l.* 15*s.* 3*d.*; that in a conversation between the plaintiff and Robins, the latter had said he would not pay Stevens, and that plaintiff had said Stevens had better settle with Robins, or Robins would put his property out of his reach, and he might whistle for his money. No judgment was proved or any other evidence given of Steven's claim except this *fi. fa.* The charge was as favourable to the defendant as the circumstances permitted, but they found for the plaintiff.

Richards in Michaelmas term obtained a rule *nisi* for a new trial, the verdict being contrary to law, evidence and the judge's charge, also on the grounds of surprise and on affidavit.

Wallbridge shewed cause, filing affidavits supporting plaintiff's case. He also contended that the charge had been too favourable for the defendant, having been precisely like that of *Coltman, J.*, reported in *Wood v. Dixie (a)*, which the Court of Queen's Bench decided to have been incorrect.

ROBINSON, C. J., delivered the judgment of the court.

It was the impression of the learned judge who tried the cause (and the jury seem to have come to the same conclusion) that the transaction between Robins and the plaintiff White was not a mere sham sale, but was intended to pass the property. That being so, the case of *Wood v. Dixie (a)* is a very strong authority for holding that the transaction would not be invalid, merely because the object of the sale, in the mind of both parties, was to defeat the expected execution. I confess I shall regret if we find ourselves constrained in some similar case to adopt this view of the law, for it is in my mind a much less sound view than that which had been long understood to prevail in England before that decision.

Where the object of the debtor is the honest and fair one of preventing one creditor from sweeping off everything, and he wishes to prevent that by turning his goods into money, in order that he may distribute the proceeds ratably among all to whom he is indebted—then courts of justice may feel

(a) 7 Q. B. 892.

a strong desire to uphold him in such a proceeding; but it is very repugnant to one's ideas of right that any one shall be able securely to combine with a debtor to favour that debtor's dishonest views of defrauding all his creditors, by purchasing from him goods which the buyer does not want, and which he buys only at the request of the other, for the well understood purpose of enabling him to turn his property into money, and thus placing it out of the reach of all his creditors. I fear such a doctrine is little calculated to strengthen morality and fair dealing, and would be found in this country very injurious to the community.

The learned judge however at the trial assumed the law to be otherwise than as it is now settled in England, and charged the jury in consequence more favourably for the defendant perhaps than he would have done if he had adverted to the recent case of *Wood v. Dixie*, and still the jury found in the plaintiff's favour.

The defendant was bound, I think, when he impeached the assignment as fraudulent, to shew a judgment to support the execution, and this he did not do; and we think we ought not to set aside the verdict to enable him to do this on another occasion, since the case seems to have gone to the jury upon the question whether the sale to the plaintiff was colorable or not; and moreover, it seems from the affidavits filed that the wheat which this plaintiff bought unthrashed, and which formed the chief part of the property assigned to him, turned out to be of little worth, and was mostly taken from him on a distress for rent, as he was occupying the premises which Robins had held as a servant. This distress would have prevailed against the defendant's execution at any rate, and it left but a few pounds in value remaining.

On the whole, we think we cannot properly do otherwise than discharge this rule.

Per Cur.—Rule discharged.

DOE DEM. MOSGROVE V. L'ESPERANCE.

Construction of the 4th clause of the Ordinance vesting Act, 7 Vic. ch. 11—As to the parties whom it was intended to protect.

The 4th clause of the Ordinance vesting Act 7 Vic. ch. 11, only protects persons who at the time of the Act passing held an assurance derived under the officer in charge of the ordnance of some *certain* and *existing* estate or interest in any portions of the lands about to be vested in the ordnance: a party therefore who produced merely a written receipt of rent from the ordnance officer, but could not shew any lease in existence at the time of the land being vested in the ordnance, or that a term had ever been created, was held not to come within the protection of the Act.

Ejectment for 5*l.*, south side Clarence-street, in Bytown.

One Watts, in June 1837, paid rent to the ordnance store-keeper in Bytown for this lot, at 3*l.* sterling a-year. He was assured by that officer that he should have the lot at that rent, unless and until it should be sold by public sale, when he was to have a preference as purchaser, paying the highest bid. The land was vested in the ordnance department by stat. 7 Vic. ch. 11.

On the 4th July, 1842, Watts assigned his interest to the present lessor of the plaintiff, by endorsement on the receipt for the rent paid in June 1837.

The lessor of the plaintiff, after being some time in possession, assigned by writing his interest to Charles Delaire for 50*l.*

On the 15th of June, 1848, the ordnance department made a lease of this lot under their seal to the defendant.

It was contended at the trial that this lease could convey nothing to the defendant, because Watts or those claiming under him (as it seems Delaire does) were entitled under the 4th clause of the stat. 7 Vic. ch. 11, to hold notwithstanding.

The learned judge took that view of the case, and directed a verdict for the plaintiff.

Richards obtained a rule for nonsuit on the leave reserved, or for a new trial on the law and evidence, and for misdirection.

Vankoughnet shewed cause. The whole question turned upon the construction to be placed upon the 4th clause of the Ordinance vesting Act, 7 Vic. ch. 11.

ROBINSON, C. J., delivered the judgment of the court.

There does not seem to have been any leave reserved to move for anonsuit, and we have therefore only to determine whether there was a misdirection such as entitles the

defendant to a new trial without costs. It appears to us that there was.

All that was shewn on the part of the plaintiff was, that so long ago as 1837 one Watts had paid rent for this lot to the ordnance store-keeper, at 3*l.* a-year, and that this lessor of the plaintiff at one time, and afterwards one Delaire, held the interest, whatever it was, which Watts had held. The only written evidence of any assent to occupation by any one was a mere receipt for rent. No term was shewn to be in existence at the time of this land being vested in the ordnance, nor was it shewn indeed that any term had ever been created.

It was quite clear that all that parliament meant to do by the 4th clause of the Ordnance vesting Act, 7 Vic. ch. 11, was to protect persons who at the time of the act passing held an assurance derived under their officer in charge, of any certain estate or interest in any portion of the lands about to be vested in the ordnance. "Any lease (the act says) or conveyance, or any promise of any lease or conveyance, of any part of the lands hereby vested in the principal officers or of any estate or interest therein, made or entered into before the passing of this act by any officer or person under whose control such lands or property were placed, shall be held good and valid by the principal officers, who shall be bound to ratify and confirm the same, and to execute all deeds and instruments which may be necessary for that purpose, on the terms and conditions on which such lease, conveyance or promise was."

All this shews that some certain and existing interest, or the promise of some certain and existing interest, was contemplated—something which the ordnance could ratify and confirm.

But nothing was produced or proved here which the ordnance officers could confirm or hold valid. For all that was shewn, there may have been nothing but a mere permissive occupation from year to year, and that perhaps only for a time that had passed.

I am, besides, not prepared to hold at present that if the ordnance officers should by mistake or otherwise make a

lease without attending to the directions contained in the 4th clause such lease would not convey the legal estate, though we might perhaps in any such case find ourselves authorized to hold, that the person intended to be protected by such clause could hold in a court of law under the title or assurance granted before the passing of the act. Our judgment however in this case proceeds upon the clear ground, that the plaintiff shewed nothing that could be held to disable the principal officers from leasing as they did to the defendant.

Per Cur.—Rule absolute for new trial without costs.

WATSON V. O'BEIRNE.

Extra work—When it can be said to form part of the original job—And when it must be regarded as done under a subsequent new agreement—
And may be sued for under the account stated.

Held per Cur.—That under the agreement and facts proved (as given below) the extra work claimed for by the plaintiff must be considered not as extra work done under the contract as part of the original job, but as work done under a subsequent new agreement, wholly deviating from the former contract, and which could not be in any sense regarded as work done upon the terms of the original contract, either as to time or mode of payment, and that the plaintiff might recover for such work under the account stated.

Debt on common counts for work and labour and materials found.

2nd. On account stated.

Plea—*Nunquam indebitatus*.

On the 12th of September, 1848, the plaintiff agreed in writing, under seal, "to do all the work of every kind mentioned in the departments of carpenters and joiners, painting, glazing and tinsmith's work, in the erection of two houses in Colborne-street, in Toronto, for the defendant, according to the designs and specifications of W. Fraser, architect, signed by the parties, subject to the conditions and penalties mentioned or contained in the specification, the work to be done for 375*l.*, one-half to be taken in store-pay and the other half in cash, and to receive payments for the said work by instalments to the amount of three-fourths of the work done and materials on the ground, as certified by the architect, and the balance after the completion of the work certified by the architect stating the works to be

completed to his satisfaction, the one-fourth balance to be paid in two instalments of three and six months after the completion of the work." The defendant bound himself to make the payments accordingly.

The specifications referred to were expressed to be for the erection of two houses in Colborne-street, according to the drawings and specifications of W. Fraser, architect.

The plan and specifications were of two brick houses, to front on Colborne-street, three stories high, with an arched gate-way between them; in the rear there was to be a small stable and hay-loft for each house, eleven feet by twelve, the yard between these stables and the houses was to be planked; along each side of the yard there was to be a brick wall twelve feet high and a range of sheds connecting the rear of the two houses with the stables. Annexed to the specifications was a condition as is usual, that if anything had been omitted which was necessary to complete the work, the contractor was to supply it as if it had been inserted in the specification; that the building was to be left in a complete state, according to the drawings and specifications; that no alterations or additions or omissions should invalidate or render void the contract, but an equivalent was to be given or taken, as the case might require, to be ascertained by the architect, and added to or deducted from the amount of the contract. The award of the architect to be final. The whole to be completed on or before the 1st of February following, (1849), under a penalty of 5*l.* per week for every week the works might remain incomplete after that period, the sums so forfeited to be deducted from any balance which may be due to the contractor on the completion of his contract.

After the contract was executed the defendant determined that he would have attics added to the two houses, which rendered necessary two feet more of wall and additional carpenter work in windows, two doors, &c., there being seven or eight additional rooms in the attics, and he totally changed the plan as to the back buildings. Instead of having the narrow stables in rear and having the rest of the yard planked, with sheds on each side connecting the houses

and stables, he made the stables wider, intending now to convert the houses into an inn, with suitable premises attached, and he had the whole of the yard excavated and cellars made, and had a deck-roof from the rear of the houses covering it, except a small space in the centre, and he had on each side, instead of a wall and sheds, a range of buildings put up for bed-rooms, at an additional expense of 350*l*.

After all the work was done, viz., in July 1849, Fraser valued it and certified to an estimate of it as extra work, valued at 513*l*. 10*s*.

The defendant said the extra charge was much greater than he expected, but Fraser swore that he explained all the particulars to him, and that he then said he was satisfied and accepted the work. He was told the plaintiff was willing to call in any one else to value it, but he said it was unnecessary.

The architect Fraser swore that he valued the additions as *alterations*, looking upon them as extras, but that in his estimate he had charged cash prices as usual. The defendant had directed these alterations after the work had been begun. He wished to know beforehand what the cost would be, but the architect told him that he could not tell in that state of the work what the new work would come to, and that it must be valued when all was completed; in which the defendant acquiesced.

The architect stated that he looked on the new work as work which a third party could not have been called in to perform, but as extra work under the contract.

The defendant kept a store of ready-made clothing and other articles, but it seemed by the manner in which payments were made in goods while the work was in progress, that it was not understood that the plaintiff was to be confined to receiving such goods as the defendant happened to deal in, and it was not reasonable to suppose that that could have been intended.

The work was finished in May 1849. The defendant had paid in cash and goods 561*l*. 3*s*. 6*d*., and the plaintiff claimed the balance, 327*l*. 6*s*. 6*d*.

It was objected on the part of the defendant, that the plaintiff was bound to declare specially on the contract. The Chief Justice ruled otherwise, though not without doubt in his mind, on account of the written condition, that a penalty of 5*l.* a-week should be paid if the work should not be completed by the time, which it might be argued kept open the agreement so far as difference in time only might otherwise have created a difficulty, giving a compensation for the delay but still preserving the contract. He considered on the whole that the building over the yard and making the new buildings on the sides were so total a deviation from what had been contemplated in the contract that it could not properly be treated as extra work done under it, but rather as matter beside the contract, and besides, the defendant, after the account was settled and stated to him, agreed to it and said he was satisfied; and as to the special provision in the contract about the mode of payment, it was shewn that the defendant had refused, on goods being demanded, to furnish any other goods than such as he had in his shop, though he had at first on several occasions given orders on other stores for articles which the plaintiff wanted.

The architect having, as he declared, made no addition to the prices in his estimate on account of the mode of payment, there was no reason in that respect why the defendant should not abide by it, being only now charged according to cash prices.

The jury, on a direction to this effect, gave a verdict for the sum claimed.

Dr. Connor obtained a rule for a new trial on the law and evidence and for misdirection. He relied on 4 U. C. R. 459, and also cited 1 Stark, 185; Holt's N. P. 179; 1 H. Bl. 288; 3 Campb. 352.

Hagarty shewed cause. He cited 1 U. C. R. 307; 3 U. C. R. 75; 2 U. C. R. 134; Stark, C. 407; 3 Bing. N. C. 737; 3 Moo. & Sc. 76; 4 Taunt. 748; 1 New Rep. 355; 4 Tyr. 43; 5 D. & R. 277; 12 Ea. R. 1; 1 Saund. 269, notes; 3 Esp. R. 283; 4 U. C. R. 459.

ROBINSON, C. J., delivered the judgment of the court.

On a consideration of the evidence and pleadings and of what passed at the trial, we see no sufficient reason why their verdict should not be allowed to stand. The defendant's counsel referred to the decision of this court in the case of *Ritchey v. The Bank of Montreal*, but that case and the authorities cited in it, especially the case of *Robson v. Godfrey (a)*, make strongly I think in support of the verdict.

There can be no question here about the allowance of the stipulated penalty of 5*l.* a-week in case of delay in completing the work after the 1st of February, 1849, for no such claim could be made under the circumstances. The defendant had so wholly deviated from the plan and specifications as clearly to relieve the plaintiff from the condition of finishing the work by the 1st of February, the additional work being much more than the original job.

And we think it unnecessary to consider the effect of this implied abandonment of the condition as to time, and of the insertion in the contract of the condition as to the 5*l.* penalty, in enabling the plaintiff to sue upon the agreement, and so entitling the defendant to insist that he shall do so, in order that he, the defendant, may have the benefit of the contract in regard to times and mode of payment; for when the action was brought the time at any rate had arrived for paying all; the defendant had declined to make any more payments in store-goods, except such as he had himself to sell, thereby endeavouring to hold the plaintiff to a construction of the agreement not reasonable in itself and contrary to the effect which he had himself before given to it; and the defendant moreover had, according to the evidence of the architect, assented to the valuation of the extra work, and so admitted himself to be debtor for the amount stated, for extra work, which we consider in this case not to be extra work done under the contract as part of the original job, but work done under a subsequent new agreement, wholly deviating from the former contract, and which could not be in any sense regarded as work done upon the terms of the original contract, either as to time or mode of payment,

otherwise a contract for a cottage might be enlarged into a contract for building a mansion of three times the cost.

If the ground, in this case, had afforded room for one or two more houses on Colborne-street, it might as reasonably be contended that the plaintiff might have been compelled to construct them under this agreement, and take half the cost in store-pay. The defendant had already paid much more under the agreement than the whole sum mentioned in the original contract, and the verdict is but for a portion remaining due of the 561*l.* 3*s.* 6*d.* claimed for work done beside the contract.

The defendant has pleaded only *nunquam indebitatis*, and we cannot hold that the amount for which the plaintiff had sued and recovered was not due to him at the time of the action being brought, independently of the special contract into which the defendant had entered. That contract, so far as it could apply, might be taken to be the guide as to prices.

We think there was a good right of action under Fraser's evidence, under the count for account stated, for such portion of the new work as remained unpaid for.

Per Cur.—Rule discharged.

SHORT V. KINGSMILL AND DAVIS.

Viva voce proof of the written law of a foreign country.

Semble, that it is now settled in England that the printed law of a foreign country may be proved by *viva voce* of a witness.

Variance between a recognizance of bail entered into in a foreign country, as stated in the declaration, and proved.

In this case there was a verdict for plaintiffs (375*l.* 2*s.* 6*d.*), subject to the opinion of the court as to whether the defendants were not entitled to a verdict in their favour on the third plea.

The declaration charged, that whereas on the 18th of June, 1846, Israel Warrener and Caleb W. Brown had sued out of the Court of Common Pleas for the county of Erie, in the state of New York, a *capias ad respondendum* against the (now) defendants, Kingsmill and Davis; and that the said Kingsmill and Davis were arrested thereon,

and held to bail; and thereupon, on the same day and year, in consideration that the present plaintiff, with one Moses Baker, would become bail for this defendant that if the defendants should be convicted at the suit of the said Warrener and Brown in the said action, he the (now) plaintiff and the said Baker would pay such damages as should be adjudged against the defendants, if the defendants did not pay the said damages, or render themselves, &c., in the execution of the said judgment, the defendants promised the plaintiff and the said Baker that they would indemnify them and each of them from any payment, loss or damage in consequence of their so becoming bail. And the plaintiff averred that afterwards—to wit, on the day and year last aforesaid—the plaintiff, together with Baker, did become bail for the defendants in manner and form aforesaid, and did thereby undertake that if it should happen that the said defendants should be convicted at the suit of the said Israel Warrener and Caleb W. Brown, in a certain plea of trespass, and also to a bill of the said Israel Warrener and Caleb W. Brown against them, the defendants, for taking, carrying away and converting a large quantity of personal property, boards and lumber of them, the said Israel Warrener and Caleb W. Brown, to the damage of them, the said Israel Warrener and Caleb W. Brown, of \$6000, then depending in the said Court of Common Pleas, by and at the suit of the said Israel Warrener and Caleb W. Brown against the said defendants; then the said plaintiff and the said Baker consented and agreed, and each of them consented and agreed that all such damages as should be adjudged to the said Israel Warrener and Caleb W. Brown in that behalf should be made of the lands and chattels of him the said plaintiff and the said Baker, and levied to the use of the said Israel Warrener and Caleb W. Brown, if it should happen that the said defendants should not pay to the said Israel Warrener and Caleb W. Brown their damages, or render themselves on that occasion to the prison of the people of the state of New York, in execution of the said judgment, as by the record of the said recognizance, still remaining in

the said Court of Common Pleas of the said people, before the aforesaid judge thereof, at the Court-house in the city of Buffalo, in the said county of Erie, fully appears.

The declaration then averred, that Israel Warrener and Caleb W. Brown recovered against the (now) defendants judgment in that action for \$2065 60c. (equal to 516*l.* 7*s.* 11*d.* of lawful money of Canada), and \$72 49c. (equal to 18*l.* 2*s.* 5½*d.*), for their costs; and that although the defendants had notice thereof, yet they did not render themselves in execution, &c., nor pay the damages awarded, nor any part thereof; and that the plaintiff has been obliged to pay Israel Warrener and Caleb W. Brown a large sum of money—to wit, 500*l.*, and 100*l.* for costs—in consequence of his having so become bail; of which these defendants had notice: yet that the defendants have not indemnified him, &c.

The declaration contained also common counts for money paid, and on an account stated.

Besides a number of other pleas, some of which were demurred to, the defendant Davis pleaded separately in his third plea, that the plaintiff and the said Baker did not become pledge and bail, or undertake for the defendants in manner and form, &c.

The defendant Davis pleaded also, as his fourth plea, that there was no such record of recognizance in the Court of Common Pleas as in the first count mentioned.

And both the defendants pleaded *non-assumpserunt* to the whole declaration.

At the trial, the only proof of the recognizance set out in the declaration was a paper, exemplified under the seal of the Court of Common Pleas of the county of Erie, in the following words:—

*Erie Common Pleas, of October Term, in the year of our
Lord 1846.*

Erie County, } James Davis and William Kingsmill are
to wit. } delivered to bail on the taking of their
bodies to Patrick Short of the city of Buffalo, in the said
county of Erie, merchant tailor, and Moses Baker of the
same place, grocer, at the suit of Israel C. Warrener and C.

Wheeler Brown, in a plea of trespass for *twelve hundred dollars*, pursuant to an order of J. Burrell, Esquire, one of the judges of this court, made in this cause on the 18th day of June 1846.

(Signed) P. SHORT, (*L. S.*)
M. BAKER, (*L. S.*)

Taken and acknowledged this 26th day of December 1846,
before me,

(Signed) LYMAN B. SMITH, *Com.*

It was objected that there was no proof of such a recognizance as the declaration averred, containing such a condition as is there set out, nor any condition whatever. It was sworn by the under sheriff of Buffalo, who was examined as a witness on the trial, that a written law of the state of New York, whether a statute or a rule of court he could not tell, provided that the condition of recognizances of bail should be, that the defendant in the action, in case of judgment being given against him, should be amenable to the process of the court against his person, or that the bail should pay the judgment; that he never saw any recognizance taken in other form than this was as exemplified, but that he never took a special bail piece, and was not a lawyer.

The objections taken by the defendant were—

1. That what was exemplified was not stated to be a record of anything actually signed by these parties.
2. That it contained no condition such as the declaration set out.
3. That if there was any written law of New York which directed such a condition to be supplied or understood, though not expressed, that such written law was not proved or shewn.

The Chief Justice directed a verdict for the plaintiff, £375 2s. 6d., subject to leave given to the defendants to move for a nonsuit on the objections raised.

The defendants accordingly obtained a rule for a nonsuit, or that a verdict be entered for the defendants pursuant to leave reserved, or for a new trial without costs on the law and evidence, or to reduce the verdict by striking off the

costs recovered in the foreign court in the action against the now plaintiff.

The plaintiffs, in shewing cause, filed several affidavits duly sworn in this province, of gentlemen practising the law as attorneys in Buffalo, in which they swear that the recognizance taken in this case is such as is always taken in the Court of Common Pleas there; that no conditions are ever inserted in the recognizance, but they are implied by the law of the state, and are such as are stated in this case.

Cameron, Q. C., for the plaintiff, cited *Law Times*, 1850, p. 253; 1 Peake 5; 11 C. & F. 85; *Shore v. Burrell* in our own court.

Vankoughnet for the defendants. He cited 3 E. R. 221; 2 Stark C. 7; 4 Campb. 28; 1 Campb. 63; 3 Campb. 215.

ROBINSON, C. J., delivered the judgment of the court.

It seems now to be settled in England (*a*), though not without difference of opinion among the judges, and certainly in opposition to the principles stated in books of evidence of the highest authorities before these decisions, that the written law of a foreign country may be proved by *viva voce* testimony of a witness. But assuming that we should feel it right to adopt the recent decisions to which I refer, and assuming also that they apply clearly to the present case, we feel that we cannot do otherwise than determine against the plaintiff on the evidence received.

The declaration avers, that on a certain day the plaintiff and Baker undertook that if the defendants should be convicted at the suit of J. W. and C. B. *in a certain plea of trespass*, and also upon a bill of the said J. W. and C. B. against them the defendants for taking, carrying *away and converting a large quantity* of personal property, boards and lumber of them the said J. W. and C. B. to the damage of *them the said J. W. and C. B.* of \$6000 then depending, &c., then that all such damages as should be adjudged to the said J. W. and C. B. in that behalf (which from this statement might be to the extent of \$6000) should be made of the lands and chattels of him the said plaintiff and the said

(a) 8 Q. B. R. 208; *Law Times*, 1850, p. 253.

Baker, if these defendants should not pay such damages, or render themselves, &c.

The defendants by their pleading deny expressly that they did enter into such an undertaking, and this issue the jury were sworn to try. It was necessary then that it should be shewn that the defendants did enter into a recognizance in those terms ; and the only proof of this was by producing a recognizance which appeared to have been entered into in a suit between Warren and Brown, plaintiffs, and Davis and Kingsmill, defendants ; which suit is therein stated to have been in a plea of trespass for \$1200. So far as the paper produced did give evidence of the undertaking which these defendants had entered into, it contradicted what the declaration averred, for it limited the defendant's undertaking to be answerable in an action for \$1200, whereas the declaration states them to have made themselves liable to the extent of \$6000 ; and the variance is anything but immaterial, for the verdict which has been rendered does exceed the \$1200.

Then as to all that is said in the declaration about converting boards and lumber,—for all that we can see in the recognizance itself it may be purely imaginary, and the action may have been one for a trespass of a wholly different kind. The plaintiffs set out a recognizance in certain particular terms as to amount and cause of action, and verify their statement by reference to a supposed record of it. Their statement is denied, and they not only shew nothing that supports their statement, but they produce what varies from it so essentially, that without disregarding the rules of evidence universally submitted to in these cases, we cannot hold the plaintiffs' declaration sustained.

If, taking together the proceedings in the original action, the recognizance in question as it was actually framed, and the existing state of the law in the foreign country, we could be warranted in importing into the recognizance a great deal that does not appear there, and to read it as if it were there, then a foundation should be laid for the reception of that indirect proof by stating the facts in a manner to suit the case ; and there should at least be no

irreconcilable difference between the undertaking stated and that proved.

We are all clearly of opinion that the evidence given did not support the plaintiff's recovery upon these issues, which denied the fact of the defendant having entered into such a recognizance as the declaration set out; and in strictness, it follows that the plaintiff should have been nonsuited; but we will grant the plaintiff a new trial on condition of his paying costs; and if he has occasion, and desires to make amendment in his declaration, he must make an independent application for that purpose.

Per Cur.—New trial granted on those terms.

GIBB V. McDONELL.

General average—Liability of owners of goods stowed below, to average, upon loss of goods laden on deck.

The owners of goods stored under the deck of a vessel, are not liable to contribute by way of general average to the loss of goods laden on deck and thrown overboard from necessity in a storm, and with the hope of saving the ship and cargo. *Semble*, that the ship-owner would in such a case be liable to general average. The owners of a vessel have no right to set up a claim to average on account of expenses occasioned by stranding, when the stranding was not voluntary; and it has been held "that the mere steering the vessel to a less dangerous place for stranding, when she is inevitably driving to the shore, is not a voluntary stranding."

Semble, that as between British vessels, the law of the port of delivery, being their own law, must govern.

Assumpsit on common counts for money paid; money had and received, and on account stated. Damages, 500*l*.

Plea—Non-assumpsit.

The plaintiff by his particulars claimed 265*l*. 2*s*. 9*d*., as a sum which the defendant wrongfully compelled the plaintiff to pay, by unlawfully detaining the plaintiff's goods, and which was paid under protest.

The defendant was owner of the schooner "Charles P. Thompson," on board of which 296 barrels of pork, belonging to the plaintiff, were shipped at Cleveland, in the United States of America, to be carried to Kingston, in this province. When the pork arrived at Kingston, the defendant's agent there refused to deliver it, unless general average were first paid in respect of the cargo thrown overboard on the voyage, from stress of weather. The arrival was in July, 1848.

It was admitted that it is customary in this navigation to carry loading on deck in the summer months, and that no objection was made to the goods which were thrown overboard being stowed on deck.

The bill of lading was not produced on the trial, and no evidence of assent by the shipper or his agent that the goods should be carried on deck, nor any knowledge that they were to be so carried. The facts were imperfectly shewn at the trial as to what part of the cargo were stowed on deck or under deck. There was a large quantity of corn (3,340 bushels) on board, belonging to another shipper. In the captain's affidavit, which was by consent read in evidence, this was sworn to have been deck lading, and to have been thrown overboard; but it seemed by other evidence to have been carried below deck, and not thrown over but was damaged by the vessel springing a leak.

It appeared that the vessel, in coming down lake Erie from Cleveland, met with a severe gale and sprang a leak; that the water gained so fast in her that it was found necessary to lighten her, to prevent her sinking before they could reach the south shore of the lake, which they made for, sailing before the wind; that on approaching the harbour of Barcelona, the master found that his draft of water was too great to allow her to enter the harbour, and that the only chance of saving the vessel and crew was to run her ashore, which he did. The corn, which was in the hold, was much damaged by wet—whether from the leakage or in consequence of the stranding, was not certainly shewn. The vessel had sailed from Cleveland, in the state of Ohio, bound for Kingston, in Upper Canada, where her cargo was to be delivered.

There was evidence that according to the law and usage of the state of New York, deck loading is at the risk of the owners of the vessel where what is called a clean bill of lading is given, and never at the risk of the shipper except by special agreement, and that jettison of cargo stowed on deck is never the subject of general average; that goods so laden are made to contribute to general average, but are never contributed for.

A verdict was taken for plaintiff, for 253*l.* 2*s.* 4*d.*, subject to points reserved, upon which leave was obtained to move next term.

The following points were made at the trial :—

1st, Whether the plaintiff, as the owner of the pork which was laden under deck, could be made to contribute in respect to it on general average for the loss of the deck cargo thrown overboard under the circumstances stated.

2ndly, Whether the damage done to the corn—which upon the evidence was damage received by the corn while on the lake, or occasioned by stranding—was a subject for general average.

3rdly, Whether the expenses charged by the defendant as portion of his loss should be allowed—that is, repairs to the vessel, 8*l.* 7*s.* 8*d.* ; expenses of towage, unlading and warehousing cargo, while the vessel was undergoing repair after being stranded and before she resumed her voyage, 16*l.* 13*s.* 10*d.*

4thly, It being admitted that clear or net freight only can be made to constitute a general average, was it incumbent on the defendant to prove any expenses that should be deducted from the freight, so as to shew that there was no net freight if the fact were so ; or should the plaintiff have been held to prove that there was clear freight, and the amount ?

The parties agreed that if the court should be of opinion that the defendant was entitled to claim from the plaintiff anything, as upon a general average, but not so much as was received by him under protest, then that the verdict should be reduced as the court might direct, or upon reference to any officer of the court to be attended by the parties.

Vankoughnet obtained a rule, in pursuance of the leave reserved, that the verdict be entered for the defendant ; and he cited in support of the points taken at the trial, Ea. R. 220 ; Abbott on Shipping, 433, 428 ; 2 T. R. 407 ; 8 T. R. 209 ; 3 M. & S. 482 ; 4 Campb. 142 ; 4 Bing. N. C. 134 ; 4 Taunt. 123 ; 2 B. & C. 805.

Kirkpatrick, Q. C., shewed cause.—5 U. C. R. 297, 481 ; *Grousette v. Ferry*, Mich. Term, 1842, in our own court ;

Park on Insurance, 99, 121; 18 Ves. jr. 187; 2 G. & D. 142; 2 M. & Gr. 208; 3 R. B. R. 120; Stevens and Benecke on General Average, 81, note u, 106-7-8, 64, 210; 4 Taunt. 124.

ROBINSON, C. J., delivered the judgment of the court.

We think there is really nothing to be settled in this case but the question—whether the owner of cargo stowed under deck is liable to contribute upon a general average to the owner of deck cargo thrown overboard for the preservation of the vessel, under such circumstances as are stated; for, admitting the claim to such contribution to be legal, the calculation would not be affected by the claim set up on the part of the owners of the vessel to average, on account of expenses occasioned by the stranding, for the reason that the stranding was not voluntary, as is shewn by the evidence, any further than that the master selected one place for going ashore rather than another, when the going ashore was inevitable. The vessel was scudding before the wind towards the shore, was not in a condition to keep the lake, and was found too deep to enter the harbour. In order to save the vessel and crew from destruction, by being cast on a bold rocky shore, towards which they were driving, she was what is called beached—that is, run ashore on a sand beach, which was selected as affording a chance of safety. It has been held, “that the mere steering the vessel to a less dangerous place for stranding, when she is inevitably driving to the shore, is not a voluntary stranding.” (a) The owners of the ship did not in this case make any voluntary sacrifice for the preservation of the cargo—they could not help themselves. It is a description of loss for which all parties must look to their insurers—a case of wreck from the perils of the navigation.

Then, as to the question of the manner in which the freight is to be brought into the general average, it is of no consequence to consider that till the question is disposed of respecting the liability of the under-deck cargo to contribute, because it is only as bearing upon the principle of computing the amount of such contribution that this point is raised; and the same may be said of the second point

(a) Stevens on Average, 81, note; Marshall Insee. 542; Abbott on Shipping, 434.

made in the case stated, which regards the damaged corn stowed below the deck, and of which I must say that the facts connected with it do not seem to have been clearly brought out in the evidence, nor did we clearly perceive what was the precise point intended to be raised concerning it; but it is clear that nothing is required to be determined in this action respecting the damaged corn till the question is settled—whether the plaintiff's pork was liable to contribute in general average to the deck cargo which was thrown overboard, because it is only as bearing upon the amount to be charged in case of contribution that the inquiry would arise.

The vessel sailed from Cleveland in the United States, bound for Kingston in this province. It was at Cleveland that the plaintiff's cargo was shipped and insured, and within the waters of the United States that the jettison occurred. It is clear from what is before us, that if the question whether the plaintiff's pork, stowed below deck, should be made to contribute to the loss of the deck cargo, were to be decided according to the laws of the State of New York, it would be held not to be liable; but I take it that in this case, between British subjects, the law of the port of delivery, being their own law, should govern. The case of *Simonds v. White* (a) bears on that point.

In our own court we do not find that the question has been raised, except in one case, of *Grousette v. Ferrie* (b), when it came into discussion but was not necessary to be decided, and was not decided, because the action there was held at any rate to lie against the ship-owners for the purpose for which it was brought. We did however consider the question, and I intimated what was then my own impression upon it, and I believe my brother judges took the same view. The other objection (it was then stated) is—"that if the ship is liable to contribute to the owner of the deck cargo, so must the owners of the cargo stowed in the hold be liable, and that the plaintiffs, being obliged to look to them for their proportion, should not have been allowed to recover against the ship-owners more than their

(a) 2 B. & C. 805. (b) Michaelmas Term, 1842.

ratable proportion, when all who were liable had been made to contribute. But this assumes that the owners of the cargo stowed below are liable to contribute for deck cargo thrown overboard under these circumstances, which seems to be at least very questionable; and I take it to be the general principle that such cargo is not liable, though the ship may be, because the load is taken on deck with the assent and for the advantage of the owners."

We have found nothing that would warrant us in holding different language on this point now. On the contrary, we believe that if we were in this case to hold that the owner of deck cargo thrown overboard, as this was, can call upon the owners of the under-deck cargo to contribute to his loss, we should be making the first decision in favour of such a claim. The text books are against it. Mr. Stevens, in his *Treatise on Average*, affords no support to the claim, but on the contrary, (pages 64, 210, 236, 248). Mr. Abbot, in his *Treatise on Shipping* (page 429), notices the exceptions to the general rule respecting goods loaded on deck, in the case of boats or other small vessels going from port to port, or of trades in which that mode of stowage is sanctioned by custom; but he is then speaking of the liability of the ship-owners for goods so stowed, and of the liability of the ship-master to his owners for goods taken on deck without their consent.

The cases to be referred to in English courts are very few, for such questions are usually in England settled otherwise than by litigation in courts of justice. *Da Costa v. Edmunds* (a), *Gould v. Oliver* (b), and *Milward v. Hibbert* (c), are the cases to which we must look for the decision of this point. Two of these are in actions against insurers, where the only question could be—whether the goods so stowed came within the risk insured against, which would of course depend upon the policy and where nothing special was contained in it, then upon the known usage in the particular navigation; because it would be with reference to that, the insurers would be presumed to have made their contract and to have received their premium.

(a) 4 Campb. 143. (b) 4 Big. N. C. 134. (c) 3 Ad. & Ell. N. S. 120.

In *Gould v. Oliver*, the owners of deck cargo thrown overboard on a voyage from Quebec were claiming contribution from the ship-owners, and the court, on the evidence that timber in such voyages was ordinarily so carried, allowed it, but not without much deliberation and discussion, founding their decision rather on reasoning than authorities. In arguing the case, Sergeant Wilde took the distinction, that the question then was not between different shippers of goods (which in the case before us it is) but between the shipper and the owner of the ship, and he contended that the owner of the ship, who is responsible for the correct loading of her, must be liable to contribute to the loss of the goods so sacrificed, whatever may be the case with underwriters or shippers of *other goods*. Tindal, Chief Justice, in delivering the judgment of the court, is careful to keep the same distinction in view. "The question," he says, "before them was, whether the ship-owner, *who has laden the goods on deck under a privilege reserved to him* by the general usage of the voyage, is liable *for contribution to the owner of the goods*. And upon the best consideration we can give to this question, referring at the same time to the foreign authorities, and to the few decisions which have taken place in our courts, we think the plaintiff entitled in this case *to contribution against the ship-owner*."

He grounds this opinion too on the exception engrafted by foreign writers, citing the *Consolato del Mare*, and *Emerigon* "that goods laden on deck and cast into the sea shall not receive contribution, *saving to the owner of the goods his recourse against the master or ship-owner*;" an authority which, while it justifies recovery in the case before the Common Pleas, would preclude it in the case now before us. And so where he cites from another foreign writer the position, that the rule against contribution for the loss of deck cargo does not apply in respect of boats and vessels going from port to port, where the usage is to load merchandise on deck, he contends that it authorizes contribution in such cases, *at least so far as the ship is concerned*.

And it is to be remarked, that if it had been the impression during the discussion of *Gould v. Oliver* that the owner

of the rest of the cargo would be liable to contribute, it would hardly have failed to engage attention, because such liability must have been taken into account in adjusting the average. It is possible, however, that the cargo may all have been owned by the same person.

Now here we are desired to hold, and for anything that appears it would be for the first time, that the owners of goods stowed under the deck are liable to contribute to the loss of goods laden on deck and thrown overboard as, we presume, in this case, from necessity, in a storm and with the hope of saving the ship and cargo.

This would be carrying the claim of contribution further than it was carried—and not without hesitation and difficulty—in *Gould v. Oliver*. We may not feel certain that the same court which there supported the claim against the ship-owner would not have brought themselves, on reasoning and principle, to go a step further and support a claim against the owners of the rest of the cargo, if that had been the question before them. I infer from the general tenor of the judgment that they would not; and though the question is not left upon satisfactory ground by the few English authorities upon the subject of contribution, we consider that we are adopting the view of the case which up to this time is most consistent with authority, in holding that the owner of the deck cargo in the case before us had no claim on the plaintiff for contribution, and therefore that the defendant wrongfully detained his goods from him on account of such claim.

There are obvious reasons against allowing it, though whether they would be held conclusive now in England may seem uncertain. The ship-owners, eager to make the most of the voyage, may be content to use the capacity of the vessel to the utmost, by loading the deck freely, knowing, however, the liability which they will incur in case of loss in regard to any portion of the cargo sacrificed. The insurer may be in no position to object, if he goes on for years taking risks in a navigation in which he knows such a practice to prevail; he may be supposed to proportion his premium to the dangers of the voyage as he knows it to be

conducted. The owner of the deck cargo need have no scruple where he knows his remedy in case of loss against the insurers and ship-owners, and where the cargo need not be suffered by him to be so laden if he is unwilling ; but the owner of cargo properly stowed below deck, stands on the footing of perfect regularity, and the risks as between him and the owners of deck cargo are not equal ; and there seems to be justice in holding, that as to him, all who are concerned in placing cargo in a less secure position shall take the risk on themselves.

Our opinion is, that the rule which has been obtained for entering a verdict for the defendant be discharged.

Per Cur.—Rule discharged.

PEEL V. KINGSMILL.

Where an endorsee suing for a note produces it at the trial from his own custody, with an endorsement thereon which has been cancelled, not as if by any accident, but in the most unequivocal manner, some explanation must be given to the jury for rejecting the inference that the note has been satisfied by the endorser whose name is thus cancelled.

The plaintiff sued defendant upon a bill of exchange and a promissory note, as endorser of the note and drawer of the bill.

There were pleas denying the endorsement of the note and the making of the bill, with other pleas, and among them pleas of payment.

Upon the trial the plaintiff produced the bill and note. The defendant's name on the back of the bill, which was drawn payable to his own order, and also his name on the promissory note as the endorser thereof, were cancelled by lines drawn across the names, in such a manner as shewed an evident intention to strike out the endorsement.

No explanation whatever was given of the reasons for which this was done, or by whom it was done—nothing to relieve the plaintiff from the inference which such cancelling, when wholly unaccounted for, might give rise to.

The Chief Justice considered at the trial, that in the absence of any explanation, the jury might reasonably infer that the bill and note had been paid ; for the plaintiff, who held them, did not shew how, or by whom, or for what

other purpose it was done, except, as it might be, on account of the money having been paid.

The jury, on such direction, gave a verdict for the defendant, generally.

Eccles moved a rule for a new trial on the law and evidence, and for misdirection, and on affidavits. *Grant* shewed cause.

The cases cited were—5 B. & Al. 474; 9 B. & C. 365; 15 Ea. R. 17; 3 B. & C. 428; 2 B. & Al. 737.

ROBINSON, C. J., delivered the judgment of the court.

The plaintiff contends that he was clearly entitled to succeed on the pleas denying the drawing and indorsement; and so he was, but nothing was said at the trial about finding specially on all the issues; and in such cases it is not unusual, when a plea is found, for the defendant on any plea which bars the action to take the verdict generally. Nevertheless, if the case turned only upon that, we might grant a new trial, unless the defendant would consent to a verdict being entered for the plaintiff on the other issues. It is a mere matter of costs.

As to the affidavits, the court are willing to grant a new trial upon them on the ground that the plaintiff's attorney seems to have been taken by surprise by the fact of cancellation being relied on as evidence of payment, and did not give that explanation of the circumstance which it is sworn can be given, and which indeed it would seem probable can be clearly made out.

As to the course which the case took at the trial, I am of opinion that the plaintiff could not properly have been allowed to recover as the indorsee of negotiable instruments which he himself produced from his own custody, and which, when produced, shewed that the endorsement had been cancelled, not as if by any accident, but in the most unequivocal manner. He could not at least be allowed to enforce them as existing securities, without giving some explanation that would afford ground for rejecting the inference that otherwise naturally arises that the notes have been satisfied by the indorser whose name is thus cancelled. An endorser of a note, when remitting the money to the

holder, if that holder were at a distance, and were a person in whom he had entire confidence, might, to save postage or trouble (though it would be irregular or imprudent), write to him to destroy the note instead of sending it to him; or he might give no direction about it, and the other might think he did enough for his friend's security when he crossed out his endorsement.

If such a plain cancelling should not be allowed in any case to support an inference of payment, great injustice would sometimes be done; and if it would support it in any case, it should in this, where nothing whatever was shewn to the contrary; otherwise the jury must be admitted to have a mere capricious discretion to look upon it as a proof of payment in one case and not in another, merely because the parties were different; but all cases where the cancellation is all that is known, must in reason stand on the same footing.

Per Cur.—New trial on the ground shewn in affidavits, on paying costs.

LOOMIS & LOOMIS V. BALLARD & WELSH.

Liability of partners after express contracts made with one of them, and after a mortgage from one has been taken extending the time for fulfilling contract.

Where there is a simple contract debt due by A. and B., defendants, and the plaintiff takes a mortgage—giving time—from A., the simple contract debt is thereby extinguished as regards B.; and it follows that B. is no longer liable to be sued on the implied assumpsit as having been a joint contractor with A.

Quare.—Where there are partners employed in making engines, &c., and the plaintiff makes an express contract with one of the partners for an engine, can he, notwithstanding such express contract with one only of the partners, afterwards sue them all?

Assumpsit on the common counts.

Pleas.—1st, non-assumpsit; 2nd, payment; 3rd, set off; 4th, accord and satisfaction by delivery of a deed of mortgage executed by defendant Ballard, bearing date the 9th of March, 1848, containing a covenant to pay 500*l.* on the 1st of April, 1849.

The replication took issue on all the pleas, denying, as to the fourth, that the mortgage was taken as a satisfaction.

At the trial at Picton in October last, before Draper, J.,

the parties agreed to try only the issues on the first and fourth pleas, and to leave the investigation of accounts and amount of damages to arbitrators. The plaintiffs called several witnesses, who gave evidence to shew that both defendants were partners in building a mill. Among other things, they proved an agreement, dated 7th April, 1847, signed by both defendants of the one part, and two persons on the other, by which the latter agreed to do all the stonemason work on the mill then about to be erected by the defendants; and the defendants agreed to pay them, and to furnish all necessary materials.

On the defence was proved a bond, dated the 9th March, 1848, given by the plaintiffs to the defendant Ballard, which recited that he (Ballard) was indebted to plaintiffs for work, and the use by him of their shop, working tools and implements in a large sum, the amount not yet ascertained; and to secure the payment of that debt, had given a mortgage of same date, conditioned to pay them 500*l.*, and was conditioned that the plaintiffs should only enforce the mortgage for the sum found to be due with interest and costs, if any were incurred. The mortgage was also put in, but contained no recitals, and was a conveyance of lands for a consideration of 500*l.*, subject to a proviso to be void on payment of 500*l.* and interest on the 1st of April, 1849. A letter was also put in, proved to be in the handwriting of one of the plaintiffs, signed "L. M. Loomis, or L. D. Loomis & Com.," dated 8th March, 1848, and addressed to Ballard, containing the following:—"I wish you to give me security for the job I am doing for you." "I wish you to do it early to-morrow, as I wish it before I send down the engines, as I would like to send them down on Thursday." "As you could give me security without any great inconvenience, it would very much assist me at present." "The expense of the writings I will pay."

On these it was contended that the plaintiffs could not in the face of the recital in the bond and of this letter, treat the defendants as partners; 2ndly, that the mortgage was a satisfaction of the debt, or if collateral that no action

could be brought before the 1st of April, 1849, in which case this action was brought too soon.

The question of partnership was left to the jury, with a direction that the weight of evidence was in favour of the plaintiffs; and as to the other questions, the jury were directed to find for plaintiffs—leave being reserved for defendant to move to enter a verdict, if the court should be of opinion in his favour on either.

The jury found for the plaintiffs, establishing the partnership of the defendants.

Gwynne obtained a rule nisi to set aside the verdict, and to enter a verdict for defendants upon leave and points reserved, the said verdict being contrary to law, and rendered under a misdirection. *Eccles* shewed cause.

The authorities cited were—1 C. M. & R. 741; 2 Stra. 1027, 261; 7 Jurist, 1156; 1 Esp. 430; Gow. on Partnership, 107; 9 A. A. E. 535; Story on Partnership, 239; Collyer, 383, 398; 2 C. & M. 617, 628; 2 M. & W. 484, 494; 1 New Reports, 104; Story on Pro. Notes, 409; 1 U. C. R. 353.

ROBINSON, C. J., delivered the judgment of the court.

There was no direct proof of partnership given upon the trial, but there was evidence from which the jury in a case under ordinary circumstances might have inferred a partnership, or at any rate a joint liability for the price of the engine furnished by the plaintiffs, if there had been proof of any special contract between the plaintiffs, and one of the defendants individually. For my own part, whatever might have been the case if no such instruments as the bond and mortgage had been given by Ballard alone to the plaintiffs for the price of the engine, yet I confess, looking at those instruments, and particularly at the recitals in the bond, I should be strongly inclined to hold that this should be treated as a case where the action of the party was confined by his express contract to Ballard alone.

The case seems to me to fall within the principle on which *Bickham v. Knight et al.* (a) and the cases there cited were determined.

(a) 4 Bing. N. C. 243.

Whether these defendants were partners or joint owners of the mill, or whatever they were, it was still competent to Ballard and the plaintiffs to enter into an express contract, as they appear to have done ; and if Ballard had given his note for the price in his individual name, Welsh could not have been made liable on such note. It may, for all we can tell, have been well understood between the defendants, if they were in any sense partners, or intending to become partners in business, which was not clearly shewn, that Ballard should contribute this engine as part of the stock to be furnished by him ; and in such case, to make Welsh pay the maker of it would be disturbing an arrangement that they had a perfect right to make as between themselves, and which could work no wrong to these plaintiffs if they engaged to make the engine for Ballard alone, as I think the jury might fairly infer from the recitals in the bond.

I am not sure, however, that my brothers fully concur in this view as to the joint liability ; and so long as any doubt remained on that point, we should have abstained from deciding the case—at least we should not have decided it at present ; but we need not delay the parties, because we are all clearly of opinion that in this case the bond of the plaintiffs and Ballard's mortgage clearly shew that if there had been before a simple contract debt due by the two defendants to the plaintiffs on account of the engine, the mortgage giving time for that debt, as it clearly did, extinguished the simple contract debt as regarded Ballard ; and it would follow from that, that Welsh could no longer be sued on the implied assumpsit as having been a joint contractor with him.

We think, therefore, that the *postea* should go to the defendants.

Per Cur.—*Postea* to defendants.

DOE DEM SILVERTHORN V. TEAL.

Statute of Limitations as against a lunatic and his heirs.

In 1822 A., a maniac, conveyed land to B., who then entered into possession. A. died in 1826. C., his eldest son and heir, became of age in 1829. He died in 1829, and his brother and heir D. (the lessor of the plaintiff), became of age in 1831, and brought his ejectment against B. on the ground that his father was *non compos* at the time of his executing the deed in 1822. D. brought his action more than ten years after the lunatic died, and after he himself came of age, and more than five years after our statute, 4 Wm. IV. ch. 1. *Held per Cur.* that D., under these facts, was barred from recovery by the Statute of Limitations; and *held also*, that B. could not be considered in possession as the servant or bailiff of the lunatic.

The case was tried before the Chief Justice at Niagara. John Silverthorn, father of the lessor of the plaintiff, was once the owner of the land. In 1817 he became insane, and it was very questionable whether he could be said to have had at any time a lucid interval, so as to be capable of bargaining and selling his land, until he died, which was in the year 1826. Nevertheless, on the 23rd of January 1822, he executed a deed conveying this land to the defendant Teal, who had by himself or his servants been in actual possession always since that time.

The heir of John Silverthorn was his eldest son Jeremiah, who came of age on the 25th of March 1829, and died intestate and without issue the 7th August 1829.

His brother and heir, Thomas Silverthorn, brought this action, seeking to recover the land, on the ground that his father was *non compos mentis* when he executed the deed. The lessor of the plaintiff was born in September 1810. The evidence was very strong to shew that the father, John Silverthorn, was a maniac from 1817, requiring generally to be strictly confined, though he was occasionally not raving and calmer than at other times.

He had taken a violent antipathy to his wife and family, so that they could not live with him safely, and it was necessary that some one should take care of him.

The defendant took him with him to two magistrates living in the neighborhood and got the deed signed in their presence, seeming to suppose either that by thus acting with their sanction, it would be concluded that the grantor was at that moment legally capable in their opinion of executing a deed, or at all events that the transaction was

such as it was fair and desirable for the sake of the lunatic himself should take place.

The magistrates are both dead.

The Chief Justice was inclined at the trial to believe that he did not intend to act fraudulently ; but he quite agreed in the conclusion which the jury came to, that John Silverthorn was not in fact of legal capacity to make the conveyance.

The only question was, whether the plaintiff was not barred by the Statute of Limitations. The Chief Justice did not see at the trial how it could be held otherwise, though the plaintiff's counsel endeavored to prevail upon him to submit to the jury that they might consider the defendant as being all the time in possession on behalf of John Silverthorn or of his children after his death, as bailiff or agent, and not as claiming adversely to them.

In order to take the opinion of the jury on the question of insanity, the Chief Justice recommended them to find for the plaintiff if they found John Silverthorn *non compos* at the time of his executing the deed, and then it would remain for the court to determine whether the plaintiff was or was not barred by the Statute of Limitations, upon the facts, which were all proved clearly and were not disputed.

Cameron, Q. C., obtained a rule for a nonsuit, with leave reserved ; he cited 8 Ea. R. 80 ; 3 A. & E. 63.

Vankoughnet shewed cause ; he referred to 28th and 30th clauses of 4 Wm. IV. ch. 1, and cited 8 C. & P. 99, 5 Jurist 170.

ROBINSON, C. J., delivered the judgment of the court.

The evidence shews that the Statute of Limitations began to run on the 25th March 1829, when Jeremiah Silverthorn became of age ; his father John Silverthorn having died in 1826, still insane.

Then this lessor of the plaintiff, his brother and heir, became of age in 1831, and was bound at any rate to bring his action within ten years. If he had sued in 1842, he would have been suing more than ten years after the lunatic died, and more than five years after our statute, 4 Wm. IV. ch. 1. The plaintiff, either here or in England, would, un-

der these circumstances, have been clearly barred, as the case of Doe dem. George and wife v. Jesson, 6 E. R. 80, clearly shews. Here more than 20 years had elapsed since the dispossession of the lunatic by Teal, who entered in 1822 after he took the deed; and although the person first dispossessed was under a perpetual disability till he died, yet more than ten years had elapsed after his death, and more than ten years also after the title of the present lessor of the plaintiff had accrued,—and indeed after he was of age and competent to assert his right, though both those facts need not concur.

The case is clearly against the plaintiff under the 28th clause of the act.

As to the ground upon which it has been attempted to rest the case—namely, that the defendant might be looked upon by the jury as holding as bailiff or servant of the lunatic John Silverthorn, we could not sanction the case being so distorted; for it is clear on the evidence, that the defendant entered as a purchaser claiming the fee, and not more in the character of an agent or servant than any trespasser who might have entered at that time. It may be a hard case, in this respect, that the defendant may have thus acquired a valuable estate for a very inadequate price, to the prejudice of the heir; but the facts were all known, and his conduct cannot be more illegal than it would have been if he had entered in 1822 by violence and driven the family off, having himself no pretence of right whatever, in which case the remedy of the heir would after this lapse of time be barred.

Per Cur.—Rule absolute for nonsuit.

WILCOCKS ET AL. V. TINNING & HORNBY.

A note made by A., payable to B. or order, and endorsed by C. in blank, cannot be declared upon by B. as a note made by C. to him the plaintiff B.

Assumpsit on promissory note, dated 11th July 1848, as being made by the defendants, payable to the plaintiffs in nine months with interest for £50.

Plea by defendants, denying the making of the note.

When the note was produced on the trial, it turned out

to be a note made by Hornby, payable to the plaintiffs and endorsed in blank by Tinning.

It was objected that the plaintiffs could not recover against either.

Verdict for the defendants.

Bell obtained a rule to have the verdict entered for the plaintiff at £50 17s. 6d. on the leave reserved; he cited *Story* on Pro. Notes, sec. 58, page 61; 15 M. & W. 208; 1 C. & M. & R, 244; 4 Campb. 115; 1 Campb. 107.

Hagarty shewed cause; he cited *Thew v. Adams* and *West v. Bown*, in our own reports, 3 U. C. R. 290; 12 Jurist, 1050; 5 A. & E. 439; 6 N. & M. 723.

ROBINSON, C. J., delivered the judgment of the court.

It does not appear by the evidence whether the indorsement by Tinning was put on at the time the note was made, or afterwards. We have referred to the case of *Thew v. Adams* in this court, which is undistinguishable from the present. The note was there made by one *Hearns*, payable to *Thew* or order, and without its being indorsed by *Thew*. *Adams* had put his name on the back of it as endorsing it in blank. *Thew* sued *Adams* as having made the note to him, but this court then decided that *Adams* was not liable as maker, and we adhere to that decision at least till we find that the law has been settled otherwise in England, upon a review of the previous authorities.

It is true that Mr. Justice *Story* informs us in his work on promissory notes, that in some of the states of the American Union an action like the present has been sustained; but he does not speak of the decisions as being fairly deduced from English authorities, or even as prevailing generally in the United States. The case of *Grinnell v. Herbert*, 5 Ad. & Ell. 338, is quite at variance with what the plaintiffs in this case are contending for; and we do not find that its authority has been yet overruled in England. We consider that the plaintiffs, in treating the promissory note as a note made by the defendants payable to the plaintiffs or order, is not sustained by any English authority whatever, but is opposed by English decisions which we have cited in the case of *Thew v. Adams*, and other cases.

Per Cur.—Postea to the defendant.

ROSS QUI TAM V. MEYERS.

Notice of countermand—Rule nisi for judgment, as in case of a non-suit, discharged on the peremptory undertaking—Condition as to payment of costs.

Where the plaintiff had given notice of countermand, and the defendant obtained a rule nisi for judgment, as in case of a nonsuit, and the plaintiff discharged the rule on the peremptory undertaking, with the condition inserted of paying not only the costs of the application but the *costs of the day*; and the plaintiff, without paying any costs—treating his own rule as a nullity—proceeded to trial: the court set aside the verdict without costs, on the ground that though the plaintiff could not be compelled, where he had countermanded his notice of trial, to pay the *costs of the day*, and that the rule, so far, was insensible, yet that the conditions as to the costs of the application being good, the whole rule granted on the plaintiff's own motion could not be disregarded by him afterwards as a nullity.

Debt on the statute 27 Hen. VIII. ch. 9, for buying a pretended title. Verdict for the plaintiff on the first count, for a penalty of 2000*l.* The count only claims 1800*l.*

The plaintiff, it appears, instituted his action in 1846, and carried it down to the assizes in that year, but withdrew it, and delayed afterwards taking it to trial, influenced, as he says, by proposals which had been made to settle it.

In the spring of 1849 he gave notice of trial again, but countermanded it; and in consequence the defendant obtained a rule nisi for judgment, as in case of a nonsuit, which, upon hearing the parties, was discharged on the peremptory undertaking; and as is usual in this court, where the practice has been so from the beginning, the court made the condition of paying costs also one of the terms of the rule. We must at least assume that the court did so order, because the rule issued in that form from the Practice Court, and it is consistent with the practice of this court.

Crooks obtained a rule to set aside the verdict with costs, on grounds disclosed in affidavits filed, or why a new trial should not be granted on the merits. *Eccles* shewed cause. The cases cited were 1 M. & W. 322 and 4 Dowl. 354.

ROBINSON, C. J., delivered the judgment of the court.

There is clearly an error in the rule, as drawn up, because it imposes not only the condition of paying the costs of the application, but the costs of the day, which would be proper and is the ordinary condition where the default has been in not going to trial pursuant to notice;

but is clearly a condition inapplicable to the present case, because the notice of trial had been countermanded, and the application was founded on the plaintiff's default in not going to trial pursuant to the practice of the court.

The plaintiff's having the rule discharged on the peremptory undertaking, and no doubt by order of the judge in the Practice Court, on the condition also of paying costs, which in this case would be only the costs of the application, never took out his rule discharging the rule nisi which was ordered in Trinity term; and the defendant, in order to restrain him from proceeding without paying costs, afterwards took out the rule and served it.

The plaintiff neither paid nor tendered the costs of the application, but gave notice of trial and tried his cause, paying no regard to the rule which had been made in consequence of his own application. This he was not at liberty to do. The rule contained one condition as to costs, by which he was bound; though it contained also another condition, which was merely insensible, and which any one would readily understand must have found its way into the rule by mistake. The words "costs of the day," however, being in the rule, neither relieved the plaintiff from the necessity of paying the costs of the application, nor entitled him to treat the rule as a nullity, which had been granted on his own motion.

We have seen what passed last term in the Practice Court, before Mr. Justice Draper, when the plaintiff applied to set aside the rule for irregularity, and quite agree with what was said by the learned judge on that occasion. The application, I think, was rightly refused; and as to the rule which is now pending, we are of opinion that it must be absolute for setting aside the verdict with costs, for it was clearly irregular in the plaintiff to carry down his cause or to give notice until he had the costs of the application for judgment, as in case of a nonsuit, taxed, and had paid them.

Rule absolute.

DOE ON THE SEVERAL DEMISES OF LUTHER HERRICK CRONK
AND EDWARD ENOCH SKAE V. SMITH.

What evidence of consideration necessary by a party claiming under a subsequent conveyance, and seeking to set aside a prior deed by reason of its non-registry.

A party who claims under a subsequent conveyance, and seeks to displace the first by reason of the prior registry of his deed, must, before he can recover in ejectment, give some proof that he stands in the position of a purchaser or mortgagee for valuable consideration. The production of the subsequent deed, stating on the face of it a valuable consideration—affording no evidence of consideration as against a stranger—will not do.

On the 28th of December, 1847, one Francis Corfield made a mortgage in fee of the premises in question, to the lessor of the plaintiff Cronk, and to Edward Skae, for 400*l.*, which mortgage was registered on the 25th of August, 1848. Edward Skae, who was a partner of Cronk's, died in 1848.

The defendant Smith was in possession under a deed of bargain and sale, made to him on the 31st of March, 1848, by the same Francis Corfield; which deed of bargain and sale was registered on the same day it was executed.

The premises consisted of a quarter of an acre of land, with a brick house, cooper's shop and stable.

It was admitted that Corfield held under a registered title.

The debt for which the mortgage was given to Cronk and Skae was not in any manner impeached. 200*l.* of it was due in December, 1849; the other 200*l.* was not due when this action was brought.

The plaintiff contended that he was entitled to hold under his elder deed, notwithstanding the prior registry of the subsequent deed to the defendant, unless the defendant should shew that he was a bona fide purchaser for valuable consideration.

The Chief Justice directed the jury that in his opinion some such evidence was necessary before the plaintiff could be required to impeach the subsequent deed; for that the averment of consideration which the deed to the defendant contained, did not afford even *prima facie* evidence of the fact of consideration, as against the lessor of the plaintiff, who was not a party to that deed, and whose prior title was sought to be displaced by it. Verdict for the plaintiff.

G. Duggan obtained a rule to set aside verdict on the

ground of misdirection. *Hagarty* shewed cause and cited, 6 T. R. 60; 13 M. & W. 662; 16 Ea. R. 212; 5 U. C. R. 346; 1 U. C. R. 502; 2 U. C. R. 319; 4 U. C. R. 271.

ROBINSON, C. J., delivered the judgment of the court.

My brothers have considered this case, and are of the same opinion that I was at the trial, that the *onus probandi* as to the subsequent deed being given for a valuable consideration, lay upon the person claiming under it.

The 6th clause of our Registry Act, 9 Vic. ch. 36, provides, like the former act, that the prior deed shall be adjudged fraudulent and void against any subsequent purchaser or *Mortgagee for valuable consideration*, who shall first register his deed. It does not provide that any person who takes by a subsequent deed, shall gain the priority by registry, but only a purchaser or mortgagee for valuable consideration.

In *Dickson v. Evans* (6 T. R. 60), Mr. Justice Ashurst says, "It is a general rule of evidence that in every case the *onus probandi* lies on the person who wishes to support his case by a particular fact, and of which he is supposed to be cognizant. In the cases referred to as having been decided in this court, and reported in 1 U. C. Rep. 502; 2 U. C. Rep. 319; 4 U. C. Rep. 14, 27; and 5 U. C. R. 346; the point has been assumed rather than determined; and we think the law does require that the party claiming under the subsequent conveyance, and seeking to displace the first by reason of the prior registry of the deed, must give some proof that he stands in the position of a purchaser or mortgagee for valuable consideration, for that is necessary to make out his case.

The only question is, whether he can be held to have given any evidence of that fact, such as calls on the other party to impeach his deed, when he merely produces and proves his deed, which states on the face of it a consideration paid by him. We think not, because that deed can estop no one but the parties to it; it forms no evidence of consideration, as against any stranger to the deed. The deed given to Smith in this case furnishes no evidence as against the lessee of the plaintiff, that the mortgage was

given for an actual debt. He cannot be called on to prove the negative, and especially in a matter of which he cannot be assumed to have any knowledge. If he were driven to impeach as voluntary a deed, which till impeached must *prima facie* be held to be good, the case would be different, but here the lessor of the plaintiff holds the elder title, and proving that, establishes his right, till something is shewn which is entitled to prevail against it. The defendant advances a deed made by Corfield, but not made till after Corfield had divested himself of his estate by making a prior deed to the lessor of the plaintiff. Nevertheless he claims a right to be preferred; but he can only prevail against the elder deed when he alleges no fraud in the transaction, by shewing that he comes under the protection of the Registry Act, by reason of the non-registry of the plaintiff's deed, and he must shew all that is necessary under the terms of the act to place him on that footing. He must prove himself by some legal evidence at least to be a purchaser or mortgagee for valuable consideration.

It seems surprising how few cases have been determined in England, upon points arising under the Registry Acts. In *Doe dem. Robins v. Alsop*, 5 B. & Al. 145, Abbot C. J. says: "A court of law is now called upon for the first time to put a construction on the words of this statute," (the Registry Act of Anne, ch. 20). This was said in 1821, the act having been passed in 1709.

We see no ground for doubt on the point now raised.

Per Cur.—Rule discharged.

ALEXANDER WHYTE AND JAMES M. WHYTE V. CAMERON.

Variance between two causes of action alleged to be identical.

When to an action brought by plaintiff on the common counts, the defendant pleaded a prior suit between the same parties for the same identical cause of action, and prayed an inspection of the record; and it appeared on inspection that the plaintiff's name in the former suit was James W. Whyte, and in the second James M. White: *Held per Cur.*—A fatal variance.

Quere—How far the declarations in the two suits, varying as to the number and nature of the common counts, and the amount claimed, would be considered fatal.

The plaintiffs sued the defendant in assumpsit on the common counts—1st. Charging that on the 1st of January, 1849, the defendant was indebted to the plaintiffs in 100*l.*, or goods sold and delivered, &c.; and in 100*l.* for money

paid, &c.; and in 100*l.* on an account stated; laying promise by the defendant to pay the said several sums, and breach to the plaintiffs' damage of 100*l.*

The defendant pleaded that before this suit, to wit, on the 8th of January, 1849, the defendant being an attorney, the plaintiffs on that day exhibited their bill against him in an action on promises, for not performing the very same identical promises in this declaration mentioned, as by the record appeared, and he prayed judgment that the bill and declaration may be quashed.

The plaintiffs replied "that there is not any such record of the bill aforesaid, in the plea aforesaid specified, remaining of record, in manner and form, &c., and this the plaintiffs are ready to verify, when, where, and in such manner as the court here shall order, direct and appoint; but, because the court are not yet advised what judgment to give upon the premises, a day is therefore given to the parties aforesaid, here, until the first day of Hilary Term next, to hear judgment thereon, &c."

The defendant demurred to this replication, and assigned for cause, that the replication put in issue matter of fact, and did not tender any issue to the defendant thereon, and that it concluded with a prayer of inspection of the record, instead of tendering an issue to the country.

The plaintiffs, taking no notice of a demurrer, prayed for judgment upon the issue of *nul tiel* record in their favour, alleging that the defendant has failed on the issue on the ground of the variance alleged. The defendant contended that the demurrer must first be disposed of.

The bill was produced by Alexander Whyte and James W. Whyte against Cameron, 8th January, 1849, in a plea of trespass on the case upon promises; for that whereas the defendant on 11th October, 1848, was indebted to the plaintiffs in 100*l.* for goods sold and delivered, &c.; and for the work and labour of the plaintiffs done for the defendant, &c.; and for money found, &c.; and for money had and received &c. And laid promises to pay the plaintiffs the said sum of money on request, and breach to plaintiffs' damage of 100*l.*

On the defendant's moving for judgment of verification of the record, the plaintiffs objected variances :

1st. Because one of the plaintiffs in this suit was James M. Whyte, and in the record of former action James W. Whyte.

2nd. Because the record was of a declaration, with only one count claiming 100*l.* for goods sold, work and labour, and money paid, with only one promise ; whereas this action was on three counts, claiming in each 100*l.*, and laying three distinct promises ; because there was also variance in the number of counts—in the number of promises—in the sums in which the defendants are charged to be indebted—being 100*l.* in one, and 300*l.* in the other ; and because there was no count on an account stated in the former action as there was in this ; while in the former action there was a count for work and labour, and for money had and received, but there was no such counts in this.

Cameron Q. C., for the plaintiffs. He cited, 2 B. & P. 302 ; 7 Taunt. 30 ; Lord Raymond, 550.

Richards for the defendant. He cited 2 Stra. 787 ; Com. Digest Record 3, Stra. 892 ; 13 M. & W. 503 ; 7 T. R. 447.

ROBINSON C. J., delivered the judgment of the court.

It is clear that there is a complete issue of fact on the plaintiff's replication—Lord Raymond, 550 ; 2 B. & P. 302. There is nothing in the objection that the demurrer must first be disposed of.

Independently of any other exceptions, we are bound, I think, to hold that the variance in the name of the plaintiffs—namely, James M. Whyte, as called in the present action, and James W. Whyte in the record produced of the former action, is fatal. They do not appear to be actions brought by the same parties, but the contrary.

As to the other exceptions, that the declarations in the two cases do not shew the actions to have been brought for the same cause ; the test is, whether for all that appears, the same evidence would support both actions. If it is clear on the pleadings that the action pending could not be for the same cause, then the plea will be bad.

The plaintiffs claim more in this action than in the other,

but not more on any one head of claim than they could have recovered on the other, and we cannot tell on which count they really had a demand, or how much they could have proved.

For all that appears they could have proved and recovered in the former suit, all the money for goods sold and delivered and money paid which they are suing for in this action under those counts; and I am not yet satisfied that it is an objection, that in the former action there was a demand also for work and labour, which there is not in this action, because that would only shew that besides suing him for the same causes which they are now again suing for, they sued upon another additional cause, which latter fact could give them no good reason for harassing the defendant twice on the same ground of action.

Then, as to the consequence of the present declaration containing a count on an account stated, which the former declaration did not: I do not at present see that that would signify, because the evidence might shew the demands nevertheless to be identical: for instance, the defendant may in such a case have admitted a certain sum as due for the work and labour sued for in the first action. But whatever may be the force of these latter objections, the plaintiffs are, we think, entitled to judgment on account of the variance in the names of the plaintiffs; and my brothers, I believe, are under the impression that the other variances would also be found fatal to the defendant's success on the issue, on which latter point I have still some doubt.

Per Cur.—Judgment for the plaintiffs.

WILLIAMS V. M'DONALD, SHERIFF.

Right of execution debtor to hold goods purchased by an execution creditor at open sale under fi. fa., and lent to debtor, as against a subsequent execution creditor.

Where goods have been openly set up for sale under a *fi. fa.* and *bona fide* bought by the execution creditor, he may, if he pleases, lend them immediately after sale to the execution debtor, and while in his possession they cannot be seized by the sheriff at the suit of subsequent execution creditors—and where they had been so seized, and the sheriff was sued in trespass by the execution debtor, and the jury found for the defendant, upon a direction from the judge that such arrangements must be looked at as *in themselves*, without reference to the facts of the case, inconsistent with good faith and the right of subsequent creditors—the Court set aside the verdict for misdirection, and granted a new trial with costs to abide the event.

Trespass for taking goods—one count.

Pleas :—1. Not guilty.

2. The goods not the plaintiff's.

3. Justification under a *fi. fa.* Birrell et al. v. Acland.

Replication to 3rd plea—admitting judgment and writ, and replying *de injuria absque residuo causæ*.

What the plaintiff claimed in this action was, the value of a horse and gig sold under a *fi. fa.* at suit Birrell et al. v. Acland, by the defendant, as Sheriff of the District of Huron; which horse and gig she alleged were her property. The amount for which they were sold under the execution, was about 16*l.*, but they were probably worth something more—perhaps 30*l.*—as the evidence seemed to prove.

The plaintiff in the *fi. fa.* was sister-in-law of the defendant; and the case set up by her was, that some years ago her brother-in-law being in debt, and his property likely to be sold, she had judgment confessed to her by him for a debt which he owed her for money lent to him—and that under this judgment his household furniture and other property, including the horse and gig in question, were sold in execution; that for the purpose of assisting him, by securing to him the use of the horse and gig free from further molestation on account of his debts, she bought in the property, intending expressly to allow him to continue in the use of it, although the property had by the purchase become hers.

Verdict for the defendant.

Becher obtained a rule for a new trial on the law and evidence, and for misdirection. *Wilson* shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

This is a kind of arrangement not unfrequently made, and there is nothing unfair in it, or that can be justly complained of by any one. If no such thing were suffered to be done, then persons in pecuniary difficulty, which does not always arise from extravagance or imprudence, would be subject to the most painful privations, from which they could have no refuge but in charity. It would be harsh and unreasonable to hold that a friend or relative could lend them no furniture or other chattels, without subjecting them

to be sold in execution as if they were their own ; of course, if this horse and gig had been the plaintiff's property, acquired by her in any other manner than they were, although she could not have given them to her relative without subjecting them to be seized for his debts, yet she could have retained the property in them and suffered him to use them, without incurring any such risk.

It may, to be sure, be said that third parties may be misled in consequence, by dealing with and giving credit to the person so accommodated, on the supposition that he owns what he is thus openly using ; but there is no help for that, unless the Legislature should make a law establishing that whatever a person shall be allowed to use and enjoy, shall thereby become his own, which would be found, I believe, not to be a very expedient provision. Such an arrangement as I have referred to, is not uncommon ; there are several instances in our books of their being recognized and maintained according to what has appeared to be the real truth and intention.

The only peculiarity in this case is, that this plaintiff claims the property in question, not as having been hers independently of any previous title of the defendant's in the *fi. fa.*, and merely lent to him, but she claims to have bought the horse and gig at a sale upon an execution against *his* goods, and thus acquired a right to them, and a right in consequence to do what she pleased with them.

Her right may stand on as clear a ground, under such circumstances, as under any other ; but to establish it beyond suspicion and doubt, three things are necessary—1st, the debt for which she obtained judgment and execution must have been real, and not pretended ; 2ndly, she must have proceeded in the ordinary open way to have the goods sold at her suit, so that a fair chance should be afforded to the public to purchase, as in other cases—that is, there should be no management in such cases for the purpose of letting the goods pass on easy terms and under their value into the hands of the creditor, under color of the execution, in order that, without any real inconvenience to himself, he may hold himself out in future as the owner, and so protect them against other creditors for the benefit of the debtor

Where the goods have been openly set up to sale, as they would have been at the instance of any creditor seeking without reserve the payment of his debt, and if they have been sold in that manner to the creditor as highest bidder, and paid for by his acknowledging so much of his debt to be satisfied, then there can be no reason why such creditor may not as well lend them to the debtor as to any one else, and with the same safety as he might lend any other of his goods.

But the remaining consideration is, that he should take care that the footing on which he allows the goods to remain with the debtor, should be capable of being made appear, so that people shall have no pretence for contending that he had parted with his property in the goods and made an absolute gift of them to his former debtor. Where they have been fairly bought under a prior execution against the debtor, and merely lent to him afterwards, no subsequent execution creditor can justly expect them to be sold a second time to pay the debts of the same party ; it is enough if they have contributed once, according to their value as sold at sheriff's sale, while they were the property of the debtor.

We think there is reason to apprehend that the jury, on the trial were led to question the *bona fides* of the plaintiff's claim in this case, not so much on the actual facts themselves as on the ground that such arrangements were inconsistent with good faith and the rights of subsequent creditors. It ought to have been left to them, with a direction that if this plaintiff, having a *bona fide* debt, merely proceeded to secure it, or a portion of it, by sale of the debtor's goods in the usual manner, so as reasonably to insure their bringing their value at the sale, then she was at liberty to let him continue in the use of them, if she chose, without their being liable while they remained her property to be seized for his debts. It is possible that on such a charge the jury might have found as they have done, and that on a review of the evidence we might not feel it proper to interfere with such a verdict ; but we think, from the manner in which the case appears to have gone to the jury, that

the plaintiff, if she desires it, should have a new trial, with costs to abide the event.

Per Cur.—New trial—costs to abide the event.

DOE DEM. STRONG V. JONES.

The description and certainty of evidence required by plaintiffs in ejectment brought on account of disputed boundaries—Field notes.

In all ejectments brought on account of disputed boundaries, the plaintiff has to shew, beyond any reasonable doubt, that he is entitled to some land at least of which the defendant is in possession; where the point is a doubtful one, the plaintiff must be prepared to shew that he has had a survey carefully made, and that the proper steps have been taken which the law requires for ascertaining the exact position of any posts along the line which can still be discovered by inspection or can be established by evidence, in order that the court and jury may see whether the two lots in question are, by the proof which the plaintiff is seeking to establish, made to occupy their proper position on the concession line.

Semble—That an admitted copy of the field notes from the Crown Lands Office may be received in evidence.

Ejectment for land, stated in the declaration to be part of lot No. 27, in the 7th concession of Cramahe, and in the consent rule to be “lot 28, 7th concession Cramahe, being the same premises as those claimed and mentioned in the declaration in this cause, and whereof the said John Jones is in possession.”

At the trial before Draper, J. at the last assizes at Cobourg, the plaintiff called two surveyors, who proved that they had surveyed the whole front of the 7th concession; and, as they understood and assumed, that there never had been a lot No. 1 in that concession, and that No. 2 had only a frontage of 17 chains, instead of being a full lot; and that not finding anything which in their judgment was an original post or monument marking the front angle of any lot in that concession, they divided the space into 33 full lots, with a frontage of 19c. 88l. each, reducing No. 2 proportionally, below 17c. frontage, and omitting No. 1 altogether—and according to this division the defendant was in the occupation of a considerable portion of No. 27, and, as it appeared from the testimony of another of plaintiff's witnesses, the defendant had not taken possession by nearly a corresponding distance easterly of his proper lot.

It appeared that in the course of the survey, the defendant pointed out to the surveyors an oak tree, marked with

the No., 29, and, as one of them said, apparently as much as 39 years old. The defendant said this was the south-east angle of No. 29, and several persons besides defendant pointed out this tree. The surveyors did not swear any of them, or take any evidence on oath—one of them saying that, to the best of his knowledge and belief, none of them offered to testify to it, and he said he did not believe it to be an original monument; and the other giving as his reason, the absence of additional marks. The first surveyor also said he should have expected to find the tree marked on three sides—29 on one, and the letter R. on the other two—but that though this tree had been cut into on the sides where these letters should have been, there were no marks. Another witness, who prepared a diagram produced, and surveyed from the western boundary of the township, which they all assumed as the governing boundary, as far as the eastern extremity of No. 25 (see stat. U. C. 4 G. IV. ch. 35, 1823), swore, that without looking at the copy of the field notes from the Crown Land Office of the original survey, he should think this oak tree a boundary mark; but that looking at the field notes, he did not think so. The plaintiff's counsel then tendered an admitted copy of these field notes, to shew that the surveyors had planted a post at the front angle of every lot, excepting where they had particularly stated otherwise; that there was no such statement respecting No. 29, and therefore, that this oak tree was no original monument, because it was not so mentioned. The judge rejected these field notes as evidence that the original surveyor had as a fact planted posts at each front angle—or had not marked this oak tree. If this oak tree marked the south-east angle of No. 29, then this witness said the defendant had not encroached on No. 27; he also said he found three stones placed nearly in the centre of the front of No. 25, as all these surveyors laid out the lots, where it was said one Blair had found a post; and according to which, the defendant would, as far as the diagram shews, be no trespasser.

For the defence it was urged, that as none of these surveyors planted any posts, marking the front angles of the

lots as they determined them, this evidence was not receivable to make defendant a trespasser, particularly as it appeared none of them had acted according to the statute in dividing the whole space equally.

The objection was overruled—as the evidence shewed that unless the oak tree was an original monument, the defendant would be a trespasser, if the space had been divided into 34 equal lots, instead of leaving No. 2 with a reduced frontage.

It was further urged for defendant, that the evidence shewed this tree to have been an original monument ; that when it was pointed out as such to the surveyors—and the marks gave *prima facie* proof of authenticity—it was their duty not to reject it without evidence, and they had taken no evidence at all ; that they had no right to decide until they had made every enquiry, and exhausted all the sources of evidence within their reach.

The jury were told that the weight of evidence was in favour of the oak tree being an original monument, at the south-east angle of 29 ; that the plaintiff had to establish his own title, and to shew the defendant a trespasser—and could not be said to have done so, without giving further evidence than he had adduced to destroy the inference which was *prima facie* afforded by this tree, marked evidently about forty years ago, and, from some of the evidence, probably much more. After which direction, they found for the defendant.

Sidney Smith obtained a rule nisi for a new trial, without costs, for rejection of evidence—the verdict being contrary to law and evidence—and for misdirection.

Cameron, Q. C. shewed cause, and *Vankoughnet* supported the rule. Authorities cited—4 Geo. IV. ch. 35 ; 12 Vic. ch. 25, secs. 35, 36, 38, 40, 42, 44, 45.

ROBINSON, C. J., delivered the judgment of the court.

We are all of opinion that the verdict in this case should be allowed to stand. It would have been proper, I think, that the copy of field notes should have been received in evidence ; but it is evident, on the inspection of them, that they could not have supplied what was wanting before the plaintiff could be considered entitled to a verdict.

Upon the point whether the tree spoken of as supposed to have been marked in the original survey, was really intended to be the monument at the south-east angle of lot 29, the field notes could not have been material, for they only shew that the surveyor, in the course of his survey generally, did what we know is done on all other surveys—blaze trees and set posts. They say nothing about the monuments at the angles of this lot in particular, whether either of them was marked by a tree or not.

In one respect the field notes give information material to the case. They seem to shew that there was no No. 1 laid out in the seventh concession; they give no information, however, that would lead us to conclude that No. 2 was of less width than the other lots.

In all ejectments brought on account of disputed boundaries, the plaintiff has to shew beyond any reasonable doubt that he is entitled to a verdict for some land at least of which the defendant is in possession. The plaintiff in this case did not make that clear, nor would it have been at all clear with the aid of the field notes. Where the point is a doubtful one, as it is here, the plaintiff should be prepared to shew that he has had a survey carefully made, and that the proper steps have been taken which the law requires for ascertaining the exact position of any posts along the line which can still be discovered by inspection, or can be established by evidence, in order that we may see whether the two lots in question are, by the survey which he seeks to establish, made to occupy the proper position on the concession line. This is one of those cases in which all depends upon the proper proof of the nearest posts planted in the original survey; and we cannot say that the plaintiff, by the evidence which was received, shewed the defendant to be a trespasser on his land; or that if the copy of the field notes had been admitted, his case would have been such as could have entitled him to a verdict.

From the account given of this concession line at the trial, and on the argument of this rule, and referring to the private act passed (4 Geo. IV. ch. 35), I am afraid it will not be easy to do justice to the several occupants along that

line, without legislative interference ; but when data are supplied, from which certain inferences can be drawn, a court of justice can determine, according to the general principles of law, though it may happen that the decision which they may be bound to give, will in the particular case operate unjustly.

At present I see nothing in the statute 4 Geo. IV. ch. 35, which can authorise us to make this township an exception to the general rule ; all that it provides is, that the governing side line of the township (which is in this case the eastern side line) shall be laid out on its proper course, having been in the first instance erroneously run ; but after the error has been corrected, that line is to form the governing side line of the township, and the measurement and numbering must begin from it.

What effect that may have on the boundaries of the parties, cannot be seen with certainty from all that was before the jury on the last trial, and we do not find that the evidence given in conjunction with the field notes could possibly enable any one to pronounce whether the defendant is or is not in possession of lot 27 ; whether the tree to which much of the testimony related was a boundary tree or not. The plaintiff, we think, did not make out a clear case, and the verdict was properly given for the defendant.

Per Cur.—Rule discharged.

CULBERT V. CONGER.

Setting aside verdict for irregularities appearing on the record, viz. in the return day and teste of the venire facias.

The Court will not set aside a verdict for irregularity because an evident clerical defect has been altered in the record after it has been entered for trial.

A mistake in the *teste* of the *venire facias*, inserting the 13th year of the reign, instead of the 12th, is not an irregularity appearing on the record, but in the process issuing to the coroner to summon the jury, and is therefore no ground to set aside the verdict for irregularity.

Trespass for taking goods.

Pleas :—1. Not guilty.

2. Property not plaintiff's.

3. Plaintiff not possessed, &c.

Verdict for plaintiff, 33*l.* 9*s.* 9*d.*

The defendant, by *Weller* as counsel, moved to set aside the verdict for irregularity, with costs :—1. Because the

award of *venire facias* was altered after the record was entered for trial.

2. Because the award of *venire facias*, when the record was entered, contained no return day.

3. Because the *venire facias* and *jurata* (meaning the *destringas*) were respectively tested—the first the 11th June, and the latter the 11th August, 13 Victoria—which, as to the former, would be 11th June 1850, instead of being tested on the first and last days of Trinity term respectively.

4. Because the *venire facias* was tested of a day after the day of the return thereof—or for new trial on the merits on the law and evidence, and on affidavits.

D. B. Read shewed cause. Cases cited—13 M. & W. 52; 9 M. & W. 596; 2 D. & L. 199; 9 A. & E. 609; 4 M. & Gr. 461; 9 M. & W. 685; 10 M. & W. 488; 11 M. & W. 600; 1 Exch. 463.

ROBINSON, C. J., delivered the judgment of the court.

We find no good ground for setting aside the verdict for irregularity. The filling up of the blank in the *Nisi Prius* record, after it had been entered, was a very different act from altering a date or any other matter in the record. It was only supplying an evident clerical defect. Still it was not what an attorney should think himself at liberty to do, without an application for that purpose; but the affidavit explaining how it occurred in this case, relieves the attorney from any imputation of having intended an improper act, and we do not think ourselves bound to act upon this objection.

Then as to the exceptions which are founded on the accidental insertion in the *teste* of the *venire facias*, of the 13th year of the reign, instead of the 12th, that is no irregularity appearing on the record, but in the process which issued to the coroner, and by which the jury were directed to be summoned; but the jury having been taken, and the cause tried without any exception, this mistake in the *venire facias* is of no consequence, and there is no repugnancy in the record itself.

But on the other grounds on which a new trial has been applied for, we make the rule absolute—costs to abide the

event—for the same reasons that we have granted a new trial in the case of William Culbert v. Conger. And so also in the case of George Culbert v. Conger, we grant a new trial on the same terms—on the evidence and on affidavits. The parties and the facts in these cases are so mixed up, that it appears to us the ends of justice require that as the merits are to be subjected to another trial in one of the cases, they should in all.

Per Cur.—New trial ordered on payment of costs.

DAWSON V. FRASER.

Warrant of Commitment for not finding sureties to keep the peace—what it should contain—as to period of commitment—payment of costs—statement on oath, &c.

A magistrate's warrant of commitment for an indefinite time is bad—a commitment is also bad which directs the prisoner to be kept in custody till the costs are paid, without stating what is the amount of costs.

Quære?—In a case on arrest, for want of finding sureties for the peace, is it necessary to state on the face of it that the justice had *information on oath*, which would justify him in binding the prisoner to keep the peace?

Semble—This would not be necessary in respect to warrants committing prisoners upon charges of offences committed.

This was an action of trespass, brought against a magistrate for false imprisonment of the plaintiff.

The first count alleged that the defendant, on the 11th day of May 1849, made an assault on the plaintiff, and caused him to be apprehended, and seized, and laid hold of, and to be forced and compelled to go and be conveyed in custody, in and along divers public streets and highways, to the office of the clerk of the municipal council, and there to be imprisoned and kept and detained without any reasonable or probable cause whatsoever, for the space of twelve hours.

The second count alleged that the defendant caused the plaintiff to be apprehended, and seized, and laid hold of, and to be forcibly conveyed in custody from the office of the municipal council at Perth, to the gaol, and there to be imprisoned and kept and detained in the gaol for the space of two months, contrary to law.

The third count alleged that the defendant caused an assault to be made upon the plaintiff, and caused him to be beat, ill-treated, and apprehended, and imprisoned, and kept and detained in prison for the space of two months.

The defendant pleaded the general issue by statute.

At the trial, the plaintiff produced and proved a warrant in these words:—"District of Bathurst, to wit. To Anthony H. Wiseman, high constable in said district, or to any other constable in the same: Whereas upon the information and complaint upon oath of one Alexander McLaren, of the township of Beckwith, in said district, esquire, made before me, Alexander Fraser, esquire, one of her Majesty's justices of the peace in and for the district aforesaid, that from certain circumstances that has lately occurred, and from threats used by one Christopher Dawson to the said deponent, is apprehensive and verily believes that the said Christopher Dawson will do him a personal injury, or that he will destroy his property, unless restrained by law. These are, therefore, in her Majesty's name, to command you, that you forthwith apprehend the said Christopher Dawson, if found within your limits, and to bring him before me or some other one, being one of her Majesty's justices of the peace, in order to answer to the said complaint, and to be further dealt with as the law directs: herein fail you not.

"Given under my hand and seal, this 11th day of May 1849.

[L. S.] A. FRASER, J. P., Bathurst District."

The constable proved that he arrested the plaintiff upon this warrant, and took him to the office of the clerk of the municipal council, where he was detained two hours, and then was committed to gaol.

The warrant of commitment was then proved, and was in these words:—"District of Bathurst, to wit. To William Mathieson, Keeper of the Gaol at Perth, in said district: Whereas Christopher Dawson, in the said district, yeoman, is now brought before me, Alexander Fraser, esquire, one of her Majesty's justices of the peace in and for the said district, and is by me required to find sufficient sureties to be bound with him in a recognizance to keep the peace, and be of the good behaviour towards the Queen and all her liege people, and especially towards Alexander McLaren of Beckwith, in the said district, esquire, and Dun-

can McNee of the same township and district, yeoman ; and whereas he the said Christopher Dawson hath refused, and doth now refuse before me, to find such sureties : these are therefore, in the name of our said lady the Queen, to command you the said keeper to receive the said Christopher Dawson into your custody in the said gaol, and him there safely to keep until he shall find such sureties as afore-said, or be otherwise discharged in due course of law.

“ Given under my hand and seal, this 11th day of May, in the year of our Lord, 1849.

[L. S.] “ A. FRASER, J. P., Bathurst District.”

At the bottom of the warrant was written these words : “ The prisoner is required to find four sureties, to be bound in fifty pounds each, himself to be bound in two hundred pounds ; that is to say, one hundred pounds in each case—the costs also to be paid.

“ A. FRASER.”

It was proved the plaintiff was imprisoned during two months under this warrant.

For the defendant, the information of Alexander McLaren was proved, upon which the first warrant was issued for the apprehension of the plaintiff, sworn before the defendant on the 11th May 1849. After the plaintiff had been arrested and was before the magistrate, it was proved that Duncan McNee made oath before the defendant, that he was apprehensive that plaintiff would do him a personal injury, or that he would destroy his property, unless he was restrained by law ; and further, that he considered the plaintiff a dangerous character.

One Catherine Jackson was also examined by the magistrate, in plaintiff's presence, when before him upon the warrant ; and she swore that she had frequently heard plaintiff use threatening language to McLaren, and that upon one occasion, when plaintiff took off his coat, a pistol fell out of his pocket, and the plaintiff speaking of the pistol said that was the pistol he was going to shoot McLaren with, and that he knew McLaren was afraid of him, because he went on the other side of the road when he met him. She further stated, that upon another occasion she heard the

plaintiff speaking of some hay belonging to McLaren having been burnt, that he was blamed for it, but that let them take care, for that he would have revenge upon Duncan McNee and Mr. McLaren, and that he would yet burn something belonging to them.

On this evidence, it was agreed between the parties to submit the case, as respects damages, to the jury, and reserve the question for the court—whether, under these circumstances, an action of trespass would lie against the defendant.

The jury found for the plaintiff, damages 25*l.*, and the question now was, whether judgment should be entered for the plaintiff, or whether the *postea* should go to the defendant.

ROBINSON, C. J., delivered the judgment of the court.

The principal defect objected to here is, the commitment of the party for an indefinite time.

Pricket v. Gratrey (8 Q. B. 1080), we think settles the question, on that point, against the defendant, for the warrants are the same in both cases, except setting out that the plaintiff was charged upon the oath of the complainant, which is wanting in this case; and there is in this case the additional fault in the warrant of commitment, that it directs the plaintiff to be kept till costs are paid, and without stating what is the amount of costs; so that if the gaoler could legally detain for them, he is not told what sum he should accept.

We are clear that the imprisonment cannot be supported as legal under the warrant, and that the plaintiff must therefore be entitled to the damages which the jury have assessed.

It is not necessary to determine whether the commitment was not also illegal, for not stating on the face of it that the justice had any information on oath which could justify him in binding the defendant to keep the peace. This has been held not to be necessary in respect to warrants committing prisoners upon charges of offences committed. There may be ground for arguing that the reasons given for that decision do not equally apply to commitments for want of sureties for the peace.—1 Leach, C. C. 167.

Per Cur.—*Postea* to the plaintiff.

CULBERT V. CONGER, SHERIFF.

Trespass against the sheriff—When indispensable for the sheriff to prove judgment and fi. fa.

In an action of trespass for taking goods—brought against the sheriff, acting under a *fi. fa.*—proof of the judgment and *fi. fa.* of the sheriff is indispensable only in cases where the question turns exclusively upon the fact whether the goods have been fraudulently assigned by the execution debtor to the plaintiff.

Trespass for taking goods.

Pleas.—1st, Not guilty.

2nd, That the goods were not plaintiff's.

3rd, That the plaintiff was not possessed.

The goods were seized by the deputy sheriff, on a *fi. fa.* against the goods of Isaac Culbert, the plaintiff's father. They were taken on premises of which Isaac had been formerly in possession, keeping a tavern and managing a farm, of which he had held a lease. Isaac Culbert and this plaintiff were at the time of the seizure both living on the place, and consequently it was not clear that the goods could be said to be taken from one of them more than from the other.

The plaintiff gave evidence, as to some of the things, that he had bought them of other persons, and that they never had belonged to his father. As to other portions of the property, he endeavoured to shew that he had acquired them of his father; but the defendant, on his part, desired to prove that the assignment by his father to him was merely colourable, and a fraudulent contrivance to evade the payment of this very debt from the father to Simpson, which the father complained of as unjust, and declared he would never pay it.

The *fi. fa.*, however, at the suit of Simpson, was not produced at the trial, nor was any proof of it given, or of the judgment.

It was objected, that without shewing the writ, the defendant was not entitled to impeach the alleged assignment, since it would be binding on Isaac Culbert until due proof was given of there being an execution creditor on whose behalf the sheriff was authorized to seize.

The learned judge so ruled; and upon that ground it

appeared the jury gave the verdict for the plaintiff—£0*l.* damages.

The defendant filed an affidavit accounting for the non-production of the writ, from the fact of his attorney being ill for some weeks before the trial, and not in a situation to attend to his business.

The questions were—first, was the production or proof of the writ clearly indispensable in this case, where the goods could not be said certainly to have been taken out of the plaintiff's possession, and where (if they were not so taken) he had to prove his title to the goods in order to shew his right to damages for the conversion—not having the *prima facie* right arising from an exclusive possession.

Secondly, If the defence could not be sustained without the writ, then, ought the court to relieve on payment of costs.

It was contended that the defendant should have justified specially under the *fi. fa.*, and that even if the writ had been shewn, the plaintiff must have recovered on these pleadings.

Vankoughnet, and with him *Weller*, obtained a rule for a new trial on the law and evidence, and on affidavits. *D. B. Read* shewed cause. The authorities cited were—9 Dowl. 408; 6 Scott, N. R. 237; 5 M. & Gr. 760; 4 U. C. R. 354; 7 C. & P. 501; 2 Sc. N. R. 98; 3 M. & W. 652; Roscoe, 644; 4 B. & Ad. 541; 2 Cr. & M. 413; 7 T. R. 117.

ROBINSON, C. J., delivered the judgment of the court.

The learned judge who tried this cause has reported himself strongly inclined against the verdict on the merits of the case, though he felt himself bound to direct in favour of the plaintiff on the mere legal difficulty of the defendant not producing the writ.

The appearances of a fraudulent collusion between Isaac Culbert, the execution debtor, and his three sons, to obstruct and defeat the process of the law, are so strong, that if we were satisfied, upon an examination of the evidence, that the non-production of the *fi. fa.* made the defendant's failure at the trial inevitable, yet, considering the circumstances under which that step occurred, we should most

probably have granted a new trial on payment of costs, even in that case ; but it does not strike us that the *fi. fa.* was indispensable, as it was assumed to be, because the question did not by any means turn exclusively upon whether the goods had been fraudulently assigned by the debtor to this plaintiff, his son. A considerable portion of the goods was claimed by title quite independent of Isaac Culbert, and therefore the principle, that before the sheriff can impeach an assignment as fraudulent he must shew that he was acting on behalf of a creditor who had a right to call it in question, does not apply in regard to the whole case.

Neither was it clear, on the evidence, that the goods could be said to have been taken by the sheriff from the possession of this plaintiff. The premises on which they were taken had been lately his father's, if they were not still his, and he was living there with his son. The jury, we think, might well have regarded the goods as being in the possession of the debtor when they were seized, and that the plaintiff was living with his father, rather than his father with him. Then if so, this plaintiff, in order to shew any claim to sue for damages on account of goods being taken out of the debtor's possession, had to prove that those goods were his. He gave different accounts of the manner in which he had acquired different portions of them : some he endeavoured to prove were bought by him from one person, and some from another, and others assigned to him by his father. Now, at least with respect to the goods which he endeavoured to prove he had bought from others, the defendant was clearly entitled to submit to the jury whether they believed that he had acquired any right to them. His evidence was liable to be contradicted, by shewing that they had been his father's, and never sold to him by other parties, as alleged.

In our opinion, there should be a new trial, with costs to abide the event, since it was erroneously assumed, as we think, that the plaintiff must necessarily succeed as to all the goods, merely because the *fi. fa.* was not shewn, or the *fi. fa.* and judgment.

Per Cur.—New trial ; costs to abide the event.

DEVLIN V. CROCKER.

New trial—Reception of improper evidence.

It does not necessarily follow, that because the plaintiff's witness, who has been recalled to rebut the evidence of the defendant, makes statements which in fact amount to setting up a new case on the part of the plaintiff, the judge must therefore refuse to allow such statements to go to the jury.

The plaintiff sued in assumpsit on the common counts.

Pleas—Non-assumpsit, payment, and set-off.

Verdict for the plaintiff—105*l.* 6*s.* 2*d.*

A new trial was moved by *McLean*, on the law and evidence, for the reception of improper evidence, or for a new trial on payment of costs, and on affidavits. *Philpotts* shewed cause.

The whole question turned upon, whether a witness who had been recalled by the plaintiff to rebut the defendant's evidence, could be allowed to make statements which really amounted to setting up a new case on the part of the plaintiff.

ROBINSON, C. J., delivered the judgment of the court.

The parties on both sides have been very earnest—the one in urging, the other in resisting a new trial. Before granting the rule nisi, the court considered the case very fully, and my brothers have since examined the evidence and affidavits. We do not find that anything was done at the trial, that furnishes ground for a legal exception to the verdict.

It is quite true that after the plaintiff had closed his case, and the defendant had also closed his defence, Irving, being recalled by the plaintiff in order to rebut the defendant's evidence, was allowed to make statements which really amounted to setting up a new case on the part of the plaintiff—such as had not been proved before the defence was gone into; but a great deal must unavoidably be left to the discretion of the judge conducting a trial, or the verdict would sometimes proceed upon ground which would be manifestly false to the conviction of every one who heard the evidence. I should hesitate disturbing this verdict upon that ground alone, though in some cases such a deviation from the ordinary course might furnish a reasonable ground for a new trial. But it certainly was most unsatis-

factory and suspicious to find Irving, when called back, giving evidence so different from that which he had just before given: it looked rather as if he might have been receiving some instructions from the plaintiff in the meantime, or was willing to go farther than he had gone before, when he saw there was a difficulty in the plaintiff's case.

Seeing how great a discrepancy there is in the parties' affidavits and statements, and looking at the tenor of the receipts which are now first shewn, we do not think it would be consistent with justice to let this verdict be final. The matter should be subjected to another investigation, but we can only grant a new trial on payment of costs.

Per Cur.—New trial, on payment of costs.

THE ATTORNEY-GENERAL V. WARNER.

Information for smuggling--Construction of Imperial act 8 & 9 Vic. ch. 93, sec. 66.

Quere.—Would an information lie under the 66th clause of the Imperial act 8 & 9 Vic. ch. 93, where the party informed against was a person shewn not to have transported or harboured the goods of *another*, but his own goods, smuggled by himself on his own account?

Information for a penalty of 100*l.* for removing smuggled goods, knowing them to be smuggled.

Plea—Not guilty.

At the trial, the case went to the jury upon the facts, which made out as clear a case of smuggling as possible, the defendant having been caught transporting these goods at midnight from Port Abino, where they had been illegally landed from Buffalo. He made no defence at the time, but submitted to the seizure, and never claimed the goods, but allowed the goods and his team to be sold, and bought the horses at the auction.

It suggested itself as a doubt to the Chief Justice, at the trial, whether the 66th clause of the Imperial act 8 & 9 Victoria, chapter 93, on which this prosecution was founded, would apply in the case of a person transporting or harbouring, not the goods of another, but his own goods, smuggled by himself on his own account. The defence, however, was not rested on that ground; nor was the verdict of the jury taken upon the question of fact, whether the

goods which the defendant was transporting were really his own or not. The evidence was not clear on that point; but a doubt having been thrown out at the trial, whether in a case of that kind an information under that clause would lie, the defendant (by *P. M. Vankoughnet*) moved for a new trial without costs, grounding his motion on that point merely, and contending that it did sufficiently appear that the goods which the defendant was removing were his own.

Richards shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

The clause referred to is the 66th clause of the Imperial act 8 & 9 Victoria, chapter 93, which enacts "that all vessels, carriages, &c., made use of in the removal of any goods liable to forfeiture under that or any act relating to the customs or to trade or navigation, shall be forfeited; and that every person who shall assist or be otherwise concerned in the unshipping, landing or removal, or in the harbouring of such goods, or into whose hands and possession the same shall knowingly come, shall forfeit the treble value thereof, or the penalty of 100*l.*, at the election of the officers of the customs."

The doubt which suggested itself to me at the trial was, whether the clause was not intended to apply exclusively to those who were assisting others to violate the law, and not to any person who was employed in smuggling on his own account; but my brothers concur with me in thinking that there is no necessity for going into that question here, because the defendant did not rest his defence on that ground, nor did it appear certainly what the fact was in respect to the property in the goods. And besides, a correspondence had passed between the defendant and the collector, which was read at the trial, and in which he clearly submitted to pay the penalty in one of the two cases on which he was prosecuted, and he was only convicted on this one. I believe my brothers have not formed an opinion that in any such case as the defendant's counsel assumes this to have been, the penalty would not attach. We all, however, concur in discharging this rule.

Per Cur.—Rule discharged.

HIGGINS V. HOGAN.

Right of ferry—Who must sue, grantee of crown or his lessee—if right be disturbed.

The crown grants a right of ferry to A., who leases, by writing, not under rent, to B. C. disturbs the right of ferry, and B. brings an action on the case against C. for such disturbance; but, *held, per Cur.*, that the plaintiff B. must be nonsuited, the right to sue being in A. the grantee of the franchise, and not in B., who, if he is interfered with, must look to A. and not to C.

Case for disturbance of a ferry.

The plaintiff declared that he was lawfully possessed of a certain ferry on and over the river Ottawa, from the township of Gloucester to Gatineau Point; and that the defendant, knowing the same, and wrongfully intending to injure the plaintiff in the peaceable enjoyment of the said ferry, carried passengers and goods for hire over and within the said ferry of the said plaintiff; whereby the plaintiff had been disturbed and disquieted in his right and title to the said ferry.

Pleas.—1st, Not guilty.

2nd, That the plaintiff was not, at the said times when, &c., or either of them, possessed of the said ferry in manner and form, &c.

3rd, Leave and license of the plaintiff.

At the trial it was proved that the crown leased the ferry by letters patent, on the 23rd April, 1846, to Mrs. Charlotte McNab, for seven years; and the plaintiff produced a letter to him from Mrs. McNab, dated the 24th March, 1849, in which she says, in answer to a proposition which it appears the plaintiff had made to her, "I hereby agree and do lease to you the ferry and cottage above described, at the rate above stated (which was 20*l.* a-year), for one year exclusively; for which I acknowledge the receipt of a joint note from yourself and others, dated 21st instant, for 20*l.*, payable in quarterly instalments; and I will be happy to grant you a lease for a further term of years, should we agree upon the security: your note, you are aware, only covers one year."

This was signed by Mrs. McNab, but it was not under seal—it was a mere letter.

The defendant's counsel moved for a nonsuit at the trial, on the ground that the plaintiff shewed no legal interest in the ferry, such as could entitle him to bring this action.

The learned judge overruled the exception, and a verdict was given for plaintiff—2*l.*; reserving leave to the defendant to move this court for a nonsuit.

Eccles obtained a rule for a nonsuit on the leave reserved, or for a new trial on the law and evidence, and for misdirection. He cited 2 B. & Ad. 336; 6 B. & C. 103; 4 Nev. & Perry, 502; 2 A. & E. 696; 6 A. & E. 824.

Vankoughnet shewed cause. He cited 7 Scott, N. R. 709.

ROBINSON, C. J., delivered the judgment of the court.

We have no doubt that the rule for nonsuit must be made absolute on the ground which was taken at the trial.

A ferry is a franchise which cannot be set up without the king's grant, and the grant in this case was not to this plaintiff.

It may be that the lessee of the crown could, under the statute 11 Geo. II., maintain an action for use and occupation against this plaintiff, though the ferry is an incorporeal hereditament, and though there was no demise by deed: that would be a totally different question.

It is true that the owner of a franchise like this cannot bring an action for disturbance, unless he is in possession; but it would not follow that any person in possession, whether by title or not, could bring such an action. Neither is it to be assumed that the owner of the franchise is not to be regarded as being in possession, for the purpose of this action, because he has a tenant holding under him.

The case of *Peter v. Kendall* (a) has the most direct bearing on this question; but as the person who had there taken the ferry, as this plaintiff did, not by deed, was held to have surrendered his interest, it became necessary to determine the point whether, if he had been disturbed while he was holding as tenant under a parol demise, he could have maintained an action for the disturbance. In the course of the argument, Mr. Justice Bayley remarked: "This being an incorporeal hereditament, would not the demise be void, not being by deed?" Of course it would be void; and I do not see how a person holding only under such an invalid title could maintain an action for interference with his right; for this is not like an action of trespass,

(a) 6 B. & C. 703.

which may be maintained against a wrong-doer upon a peaceable possession merely, whether rightful or not. In this action we must see that a right has been infringed.

It is true that the plaintiff can declare upon his possession alone, and usually does so ; but that is not decisive of the question before us: it only shews that the possession of the ferry is *prima facie* taken to be a rightful possession. But in this case the true state of facts appears, and, as we take it, Mrs. McNab is shewn to be the person entitled to sue for disturbance, and not this plaintiff, who must look to her if he is interfered with.

Per Cur.—Rule absolute for nonsuit.

THE QUEEN V. EMMA MATILDA SHERRIFF.

What a sufficient delivery of child by the mother to the father, under an order from this court.

The order of this court, commanding the wife to deliver to the husband the body of their child, is sufficiently complied with by the wife placing the child in the charge of the husband—if the child returns of her own will to the mother, and is not afterwards forcibly detained, the court will not further interfere.

Mr. *Strong* moved to make absolute a rule nisi of this court, issued in Easter term last, to shew cause on the first day of Trinity term now past, why an attachment should not issue against this defendant for her disobedience to a rule of this court, of Hilary term then last past, whereby she was commanded to deliver unto Robert Sherriff, the body of Barbara Louisa Sherriff, her daughter (and the daughter of her husband, the said Robert Sherriff).

It seems that, there being a hope of an accommodation of this family difference about the custody of the child, the rule was enlarged by consent to the first day of Michaelmas term (last).

The affidavits filed, stated that after the rule of Hilary term was made, viz., on the 24th March 1849, the father went to the defendant and demanded his daughter, and she was given to him, but she (the daughter), a child about eight years of age, was, as the affidavits declared, most unwilling to go, and resisted ; the defendant swore that she did not in the least encourage such resistance ; after a short time the child escaped and came back to her mother.

Robert Sherriff, at the next assizes for Bytown, in the autumn of 1849, had several persons indicted for abduction of his daughter on this very occasion, complaining that they took her from him against his will, and by violence ; but upon the trial the defendants were acquitted. And now the defendant made an affidavit, stating that on the occasion alluded to (24th March 1849), she did not in any way countenance the resistance of her daughter, or interfere to procure her return after she had delivered her into the custody of her husband, which she swore she did, and as it was understood by the affidavit, in the presence of the judge of the District Court. She swore that her husband could have access to the child at any time ; that she went constantly about the streets of the village, perfectly at liberty ; that she, the defendant, had been guilty of no contempt of this court, not having disobeyed the rule (of Hilary term last).

ROBINSON, C. J., delivered the judgment of the court.

It was understood, in Hilary term last, that the applicant, before moving to make absolute the rule nisi for attachment, should put to the proof the sincerity of Mrs. Sherriff's declarations that she was at all times perfectly willing to give up the child ; and it seems the husband, in pursuance of this understanding, did go and demand her on the 24th of March, and she was placed in his charge, but afterwards returned to her mother. A jury, upon a trial, and hearing all the evidence as to that occurrence, have found that there was no forcible abduction of the child.

I fear Mr. Sherriff, from some infirmity of temper or otherwise, has lost all control over his wife and child, and it is impossible that we can make the child a close prisoner with him ; we can do no more than see that he has a power of acquiring her—that she shall not be forcibly detained from him ; she has been delivered up to him since the rule of Hilary term was granted by us, and we must, in fairness, look upon that rule as no longer pending—the object of it being obtained. We have no affidavits on the part of Mr. Sherriff, to contradict those filed by the defendant ; and if we had, we could not prefer the one statement to the other.

If it be worth the while of the applicant, he may make another final demand of his daughter; and if he meets with resistance, he may apply *de novo* to this court for a writ of *habeas corpus*; but unless the child, which is of tender age, is in the way of bad example, and not likely to be virtuously brought up by her mother, there seems to be no good object in Mr. Sherriff persevering, for the child seems determined not to live with him; and I much fear, that from some unexplained cause, he cannot be a person well qualified to take the charge and control of a family.

Per Cur.—Rule discharged.

DOE MURPHY V. M'GUIRE AND FORREST, AND ROBERTSON.

Effect of landlords obtaining leave to defend in ejectment, jointly with tenants, and not doing so—As to making up record—Nonsuit for not confessing, &c.

In an action of ejectment, brought against two tenants, the landlord obtained leave to join in a defence as a third party; but not availing himself of the order, the plaintiff made up his record against the two tenants alone. He gave notice of trial, however, in a cause as against the three. The two not confessing, &c., the plaintiff was nonsuited. An application was made in term to set aside the nonsuit; but, *held, per Cur.*, that under these circumstances, there was no necessity for setting aside the non-suit. The court, however, set aside the non-suit on terms, as mentioned below.

The plaintiff was nonsuited in this cause against the two defendants McGuire and Forrest, for not confessing lease, entry and ouster.

The defendants McGuire and Forrest obtained a rule to set aside the nonsuit on the following facts:

The plaintiff first brought his action against the defendants McGuire and Forrest, serving them as tenants in possession. Then Robertson, as landlord, applied for and obtained permission to defend jointly with them, but he never took the steps necessary for availing himself of that order. The plaintiff, therefore, properly made up and passed his record in an action against McGuire and Forrest only; and when they declined confessing lease, entry and ouster, the nonsuit followed.

The plaintiff, however, gave notice of trial in a cause against these defendants, including Robertson, and not in the proper cause.

The two defendants, who had properly appeared and

pleaded, took no notice of the irregularity, but retained the notices, and allowed the plaintiff to call on his cause, without giving any intimation that they would take advantage of his mistake.

ROBINSON, C. J., delivered the judgment of the court.

We do not look on the plaintiff's proceeding under such circumstances, as so absolutely void that we must necessarily set aside the nonsuit on the application of the defendants; but we direct a rule for setting it aside on payment of costs by the defendants, and on condition that Robertson shall within one month, besides paying these costs, enter into a proper consent rule and plead, defending jointly with the tenants according to the practice.

Then as to the application for judgment, as in case of a nonsuit, we discharge the rule nisi with costs. The plaintiff was quite willing, as the affidavits all shew, to have waived all difficulties, and have gone to trial. It was the omission of the landlord Robertson to do what he should have done that gave rise to the confusion; and the other defendants, after desiring to avail themselves of any impediment they could throw in the plaintiff's way, rather than concur with him in bringing the case properly to trial, now apply for judgment as in case of a nonsuit, as if he had incurred a wilful default: and besides, we could not make this rule absolute, for it is entitled in a cause against three defendants, and asks for judgment as in case of a nonsuit in a cause so entitled, when there was in truth no issue joined in such a cause.

Per Cur.—Rule discharged.

GAMBLE ET AL. V. REES.

Setting aside assessment of damages for irregularity—judgment on demurrer—change of attorneys—necessity of filing judgment-paper before assessment of damages, after judgment pronounced on demurrer—looking behind record where object is not to set aside record itself.

Semble, that a notice of trial cannot be said to be irregular, because A., one of two partners, as attorneys, signs the notice of trial as the plaintiff's attorney, although B., the other partner, appeared as the attorney on the record, there having been no order to change the attorney.

Where the notice of trial is to try *the issues*, and assess the damages, and there are in fact no issues on the record to be tried—the notice of trial as to the assessment is not therefore irregular.

The fact that the *Nisi Prius* record contains a blank for the day on which the court pronounced judgment on the demurrer, is no ground for setting aside the assessment of damages.

Semble, that in making up a record for an assessment of damages after judgment has been given on demurrer, the more proper course would be, before the record is made up, to file a judgment-paper in the office ; but if this is not done, the irregularity, if such, must be taken advantage of before damages are assessed.

The court cannot look behind the record, unless where the application is to set aside the *record itself*—an objection, therefore, to the record as being improperly made up, without proceedings to warrant it, cannot be entertained upon an application to set aside the assessment of damages.

Covenant for title.

The defendant demurred to the declaration ; and the plaintiff having obtained judgment on the demurrer, the damages were assessed at the last assizes at 11*2l.* 10*s.* 0*d.*

The defendant, by *Gwynne*, moved to set aside the assessment for irregularity in the statement of the alleged judgment therein averred to be recovered ; and for irregularity, in assessing damages without interlocutory judgment having been first signed, or rule for judgment served ; and for irregularity, in proceedings being taken in the name of different attornies for the plaintiff, without a rule obtained in that behalf ; and generally for irregularity, disclosed in affidavits filed ; or to set aside the assessment upon affidavit of merits.

M. Cameron shewed cause. The cases cited were—Arch. Pr. 731 ; 3 Dowl. 538 ; 6 Dowl. 490 ; 7 D. & R. 260.

ROBINSON, C. J., delivered the judgment of the court.

1st. As to the notice of trial : it is objected that it was irregular, because it was signed by D. Boulton, Esq., as plaintiff's attorney, when Mr. Cockburn (his partner) was plaintiff's attorney on record, and there had been no order for changing the attorney. This is rather a rigorous objection, considering that the two attornies were or had been partners, and that it is plain from the affidavits that Mr. Boulton had been treated as attorney in the cause. *Farley v. Hebbes* (3 Dowl. 538) is much in point against the objection ; and as the defendant kept the notice of trial, and gave no notice of objection—and as his attorney appeared at the trial and took exceptions to the *Nisi Prius* record, nothing can be now made, we think, of this exception.

The notice of trial was informal, being to try issues and

assess damages where there was no issues in fact, the demurrer being to the whole declaration, and the plaintiff going down to assess damages after the judgment in his favor. But that part of the notice was merely redundant, and inapplicable—it could do no harm—the defendant could not be misled by it—he had not the less notice of the assessment.

Then as to the *Nisi Prius* record ; it contains a blank for the day on which the court pronounced judgment on the demurrer ; but we should never allow a plaintiff to be turned round for a defect of that kind ; it is a mere error of the clerk, which we should direct to be amended.

The more substantial objection is, that the defendant could not find, on searching the office, that any interlocutory judgment-paper had been filed there ; nothing to shew that judgment on demurrer had been given. This amounts to the objection that the record had nothing to warrant its being made up in its present form ; but we cannot look behind the record, unless where the application is to set aside the record itself, as being improperly made up, without materials or proceedings to warrant it ; so long as it stands, we cannot collaterally allow its truth to be questioned ; it imports, as Lord Ellenborough said, “ incontrovertible verity.” We must take it to be true as it stands ; and we know also, judicially, that it is true, and that judgment was given as is recorded for the plaintiff on the demurrer. If a certain paper ought, in consequence, to have been drawn up and filed in the office, which has not been done—that would be an irregularity, of which advantage should be taken in time ; the defendant should not lie by and allow damages to be assessed after his receiving notice of assessment, and then come and make the objection.

Besides, I believe I am correct in saying that the common practice in this province has always been to make up the record as it has been made up here, without a previous filing of a judgment-paper in the office ; though the other practice, which is clearly the more proper, may have been pursued in some cases.

With respect to the merits, the sum awarded by the jury

seems to have been fairly taken from the value of the land ; it is not shewn to be excessive ; and as to the allegations of former negotiations for settling, between the trustees of Mr. and Mrs. Harman and the defendant, they are not such as would warrant us in staying the entry of the judgment ; but if there be really any good reason in what has passed, why the defendant should not pay these damages, we have no objection to reserve to the defendant leave to move on that ground to stay execution and let that matter be fully enquired into.

Per Cur.—Rule discharged.

WARENER ET AL. V. KINGSMILL AND DAVIS.

What sufficient poof of a foreign judgment.

The mere exemplification of a foreign judgment, if properly proved to be under the seal of the court, is sufficient evidence of the judgment, without any further proof that the exemplification was compared with the original papers filed, or the roll.

Assumpsit on foreign judgment.

Pleas.—1st, Non-assumpsit.

2nd, Judgment obtained by fraud.

The only question in this case was as to the sufficiency of proof of the foreign judgment, on the issue of non-assumpsit.

An exemplification was produced, under the seal of the foreign court, and its authenticity certified by the judge and deputy clerk.

A witness (an attorney of this province) was examined, who swore that he went to Buffalo to procure this exemplification ; that he compared the copy with the original papers in the hands of the clerk, and in his office ; that he saw the seal put to the exemplification that the paper produced—*i. e.*, the exemplification was copied by the clerk from the declaration and other papers filed in the office, and that he (the witness) compared it with those papers, and not with any roll ; and that after he had done so, the copy was, at his request, exemplified under the seal of the court, which witness saw affixed ; and he saw also the judge of the court sign the exemplification.

It was objected that this was not legal proof, for that the

exemplification was compared by the witness, not with any roll, but with the papers filed. The Chief Justice held the proof to be sufficient.

Verdict for the plaintiff—61*l.* 10*s.*—with leave reserved to the defendants to move for a nonsuit.

Vankoughnet obtained a rule on the leave reserved. *Cameron, Q. C.*, shewed cause. Cases cited—*Law Times*, 1850, page 253 ; 1 *Peake*, 5 ; 11 *C. & F.* 85 ; *Shore v. Burrell*, *Old U. C. R.* ; 3 *Ea. R.* 221 ; 4 *Campb.* 28 ; 1 *Camb.* 63 ; 3 *Camb.* 215.

ROBINSON, C. J., delivered the judgment of the court.

We have none of us any doubt that the evidence given at the trial, of the foreign judgment, was quite sufficient, and that this rule must be discharged. The mere exemplification, without any evidence of examination, would of course be sufficient, if properly proved to be under the seal of the court. That is the common proof given of foreign judgments.

Here a witness—himself an attorney of this province—swore that he went to the office of the clerk of the court in question, and there saw the seal affixed to the exemplification, which is the material fact to be proved.

It is of no consequence, when that proof has been given, that the witness besides examined the paper produced as an exemplification, with certain papers in the office, in order to see that the copy was correct. If he did this imperfectly, that would not affect the sufficiency of the exemplification under the seal of the court. And because the witness, when he wished to examine the exemplification, had no roll given to him with which to compare it, but only the original detached papers themselves, brought from the files, we cannot assume that therefore the exemplification was transcribed from the same papers, and from nothing else ; and if we could infer that, still we could not on that account refuse to receive the exemplification as proof of the alleged foreign judgment ; for it may well be, and I believe it really is the case in the court in question, as we know it to be in some others, that the original papers constitute in themselves the only record, and are not extended on a roll.

Per Cur.—Rule discharged.

DOE DEM. McKENZIE AND OF WALLACE S. FAIRMAN
V. WARREN FAIRMAN.

Notice to quit—What an adverse possession for the purpose of avoiding deeds.

Where possession is demanded from a defendant in ejectment, and he, instead of claiming to be a tenant, asserts his right to the fee, he has no claim to a notice to quit as a tenant.

Where A., in possession, asserts a claim *under* and not by title independent of B., who makes a conveyance to C., B.'s deed cannot be said to be bad, as made while A. was in adverse possession.

Ejectment for lot 36, 1st concession of Pittsburg.

A patent had issued to Donald Clark, in 1798; and there had been a deed from him to Peter Grant, on the 20th of June, 1831; and a deed from Grant to Wallace S. Fairman, on the 24th of June, 1841; and a deed from Wallace S. Fairman to the lessor of the plaintiff, McKenzie, on the 7th of April, 1849.

It was proved that McKenzie demanded possession before action brought, and that the defendant declined to go out, alleging that he had bought from his brother, Wallace S. Fairman, and paid him for the land, and that his brother refused to make him a deed.

It was shewn that Wallace S. Fairman had demanded to be paid by the defendant for six years' occupation of the land, and had sued him for that and other causes of action; but it was not shewn that he had demised to him for any time.

It was proved that Wallace S. Fairman had made some verbal agreement to let the defendant have the west half of the lot if the defendant gave up his interest in some other land devised by their father's will; and that Wallace S. Fairman had been since in possession of this last-mentioned land; but whether the defendant had made any assurance of his interest to him, was not shewn.

Then it was objected that the defendant, being in adverse possession, claiming the fee, the deed made by Wallace S. Fairman to McKenzie could not operate; and that as Wallace S. Fairman had claimed for the occupation of the land, and had also, on an arbitration between him and his brother, made a charge for rent, six months' notice was necessary; and that a mere demand of possession would not answer.

The learned judge overruled the objections. Verdict for plaintiff.

A rule for a new trial was obtained, on the law and evidence, and for misdirection. *McKenzie* shewed cause. Cases cited—2 U. C. R. 153; 1 C. & M. 549.

ROBINSON, C. J., delivered the judgment of the court.

We think the learned judge properly overruled the objections. When possession was demanded, the defendant did not claim to be tenant, but asserted a right to the fee. He had no claim, therefore, to notice as a tenant; and at any rate it was only for half of the lot, the west half, that he had been desired to pay for occupation, or that he attempted to set up any claim, and nothing was shewn that could furnish any reason for opposing the recovery for the other half.

As to the adverse possession disabling Wallace S. Fairman from conveying; it did not appear that the defendant pretended any claim to the east half; his claim to the west half was under Wallace S. Fairman; he did not claim to own it by title independent of the other, but asserted his equitable right to receive a deed from him. And besides, if by reason of such an objection nothing passed by the deed to McKenzie, then the title remained in the other lessor of the plaintiff, Fairman, so that either way the defendant could not be entitled to a verdict.

Per Cur.—Rule discharged.

CAMPBELL V. GZOUSKI.

Power to grant an order upon defendant for particulars of payment—Of set-off.

Where the defendant had been ordered to deliver particulars of any credit claimed by him, by the 17th of September, and he did not deliver them till the 26th of September; *Held, per Cur.*, that he was restrained by such order from putting in evidence a letter from plaintiff, admitting a set-off in the shape of money received to defendant's use.

Semble, that it is not now the practice in England to give an order upon the defendant to deliver particulars of payment.

Assumpsit on a promissory note from the defendant to the plaintiff for 67*l.*

Pleas.—*Non fecit*—set-off—payment.

The plaintiff claimed only a balance of 47*l.* 13*s.* 1*d.* as being still due on the note, admitting part paid.

The defendant's counsel put in a letter from the plaintiff to the defendant, written in June 1842, a few months after the note was made, by which letter he contended he was shewn to be entitled to further credits—as, of the proceeds of some goods of the defendant left in the plaintiff's charge, and sold by the plaintiff under his direction.

The plaintiff objected to this evidence, because he had before the trial obtained a judge's order that the defendant should deliver the particulars of any credit claimed by him, by the 17th of September, and he had only delivered his particulars on the 26th of September (the assizes having begun on the 25th of September, and this case being tried on the 28th.)

The Chief Justice rejected the evidence, and the plaintiff had a verdict for 47*l.* 13*s.* 1*d.*

The defendant by *Phillpotts* moved for a new trial, on account of the rejection of this evidence, and moved also to rescind the judge's order under which the particulars were demanded. *McNab* shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

If the evidence contained in the letter were clearly evidence of payment, and not of set-off, then it seems that according to what the Court of Exchequer determined in *Phipps v. Southern* (*a*), the defendant ought not to have been restrained in respect to it by such an order as was issued in this case; because it was there held that a defendant could not be called upon to give particulars of payments as he may of set-off. In *Ireland v. Thompson* (*b*), the Court of Common Pleas held otherwise; but it seems the practice in England now is not to grant orders for particulars of payment.

This, however, regards merely the point of practice generally in such cases.

The evidence which was offered in this particular case, did not by any means constitute a proof of payment, but of money received to the defendant's use by sale of his effects. The very terms of the letter leave it uncertain how much

(*a*) 8 Dow. 208. (*b*) 4 Bing. N. C. 716.

had been realized, and there was nothing to indicate an appropriation of such money as the plaintiff might have received to the payment of this debt; but on the contrary the plaintiff in his letter spoke of other pressing demands on the defendant's account, which he expected funds to discharge.

Besides, if we could see evidence of any payments in this letter, so long as the judge's order was in force, the defendant was bound by it; and he had acquiesced in it, and given particulars, but gave them much too late to make the evidence admissible.

Per Cur.—Rule discharged.

ROSS ET AL. V. DIXIE.

*Endorser's liability on a bill of exchange, when drawee has refused acceptance—
Endorser of bill, how far estopped from denying drawer's signature
and capacity to draw bill.*

The endorser, like the drawer of a bill of exchange, is liable to the holder the moment the drawee has refused acceptance.

The endorser of a bill is estopped by the fact of his endorsement, from denying either the signature of the drawer or her competence, (being a *femme couverte* in this case) to draw the bill.

Declaration, by endorsees against the payee and first endorser of a foreign bill of exchange, averring that one Mary Worthy drew her bill of exchange, &c., which defendant endorsed, and that the drawees refused to accept the same; whereupon the said bill was duly protested for non-acceptance thereof; of all which the defendant had due notice, &c.

2nd plea, That defendant had not due notice of the non-payment of the said bill, in manner, &c.

3rd plea, That the said bill was not presented to drawees for payment thereof in manner, &c.

4th plea, That Mary Worthy, at the time of making, &c., and at the time of endorsement by defendant and her husband James G. Worthy, to whom defendant endorsed, was and still is the wife of the said J. G. Worthy; and that the plaintiffs took the said bill, &c., with knowledge of the premises, &c.

Demurrer to 3rd and 4th pleas, That they attempted to

put in issue immaterial matters not averred in the declaration—viz., the non-payment of the bill.

Demurrer to the 5th plea, Because it was no defence to the action as between plaintiffs and defendant (an endorser), that the drawer of the bill was a *femme couverte*.

Dr. Connor for the demurrer. He cited 3 Ea. R. 483; 5 Tyr. 107; Chitty on Bills; 2 A. & K. 181.

Jarvis contra. He cited 1 Ea. R. 432.

ROBINSON C. J., delivered the judgment of the court.

The third and fourth pleas are founded on the assumption that the payee and first endorser of a foreign bill of exchange, cannot be made liable upon it until it has been presented for non-payment, although it has been duly protested for non-acceptance.

The case of *Ballingalls v. Gloster (a)* is in point, and determines that an indorser, like the drawer, is liable the moment the holder is refused acceptance. In *Bayley on Bills*, p. 264, the law is clearly recognized as being so settled. These pleas, therefore, form no defence.

The defendant, by endorsing the bill, estopped himself from denying the capacity of the drawer to make the bill. He is in the position himself of a new maker, and cannot dispute either the signature of the drawer or his competence to draw the bill.

Per Cur.—Judgment for the plaintiffs on the demurrer.

ROBERTSON V. MEYERS.

Replevin—Avowry—Replication—Demurrer.

To an action for replevin the defendant avowed for a distress for rent due to him by one Culhaine on a demise, at a yearly rent, of which one year's rent was in arrear on the 1st of January, 1850. The plaintiff replied to this, that the close on which the distress was made, and on which the rent accrued, was, at the said time when, &c. the close and freehold of him the plaintiff, and not of the defendant. The defendant demurred to this replication, as containing no answer to the avowry. *Held per Cur.*—Replication bad.

To an action of replevin, the defendant avowed for a distress for rent due to him by one Culhaine on a demise, at a yearly rent, of which one year's rent was in arrear on the 1st of January, 1850.

The plaintiff replied to this, that the close in which the

(a) 3 Ea. R. 483.

distress was made, and on which the rent accrued, was at the said time when, &c. the close and freehold of him the plaintiff, and not of the defendant. To this the defendant demurred, as being no defence to the action, inasmuch as it might be consistent with defendant's plea, that he might have had a term for years in the alleged freehold of the plaintiff, and might have under-let to Culhaine.

Crooks for the demurrer. *Eccles contra*, cited Ch. Pl. 617.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the plaintiff's second plea to the avowry is bad. The defendant avows for a distress for rent due to him by one Culhaine on a demise, at a yearly rent, of which one year's rent was in arrear on the 1st January, 1850.

The plaintiff replies to this, that the close (in which the distress was made and on which the rent accrued) was at the said time when, &c. the close and freehold of him the plaintiff and not of the defendant; but that may be quite true, and yet the defendant may have had a good right to distrain, for it would be consistent with the defendant's plea, that the defendant may have had a term for years in this alleged freehold of the plaintiff, and may have under-let to Culhaine.

If Culhaine did not in fact hold under the defendant by demise as stated, that would have furnished ground for a different plea. If he did hold, he was liable for the rent. The plea does not aver that the defendant's title had expired after the demise made.

Per Cur.—Judgment for the defendant on demurrer.

HART v. MEYERS.

Declaration by a common informer for not performing promise on which suit was compounded—Sufficiency of averments—Of concluding by a prayer for relief.

It is a good ground of special demurrer to a declaration that it improperly concludes with a prayer for relief.

Where the declaration lays a promise to have been made in consideration that the plaintiff would forbear to prosecute a *qui tam* action, and yet does not aver that he did forbear, the declaration is bad in substance.

Where it clearly appears on the face of the declaration (which was not so apparent in this case—see judgment) that the consideration of the defendant's promise was a compromise without the leave of the court, of a penal action brought by the plaintiff as a common informer against the defendant, the consideration will be held to be illegal and the declaration bad.

Declaration in assumpsit to recover an amount of costs of a former action, which had been forborne in consideration of said costs being paid.

With respect to the nature of the former action, there was this averment in the declaration:—For that whereas, &c., heretofore, to wit, &c., there was depending in the court of our sovereign lady the Queen, before the Queen herself, a certain action of debt between the plaintiff, who sued therein as well for our sovereign lady the Queen, as for the plaintiff, the sum of —*l*.

The declaration laid the promise to have been made in consideration that the plaintiff would forbear to prosecute the *qui tam* action, and yet it did not aver that he did forbear.

The declaration concluded with a prayer for relief.

The defendant demurred to the declaration upon the following grounds:

1st. Because the said defendant was not sued as an attorney of the court, or as any other officer; nor did it appear by the said declaration that the defendant was an attorney of the court, and yet the declaration concluded by “praying relief” against the defendant, instead of “bringing his suit.”

2nd. And also because the first count of the declaration did not shew that the said *qui tam* suit mentioned in that count was compromised by leave of the court, without which it would be illegal; and no promise for the payment of the costs thereof founded on such consideration, would be legal or binding on the defendant.

3rd. And because the first count disclosed no cause of action.

4th. And because the consideration of the promise mentioned in the first count amounted to a felony on the part of the plaintiff, and out of which no cause of action could arise to the plaintiff.

5th. And because the first count did not aver the performance by the plaintiff of the consideration for the promise of the defendant, but merely stated that it was agreed that the plaintiff should forbear further to prosecute the action

therein referred to, and did not aver that the said action was forborne further to be prosecuted.

6th. And because the consideration for the promise mentioned in the first count of said declaration was founded on a condition precedent to be performed by plaintiff, and no averment of performance thereof was made in declaration.

Crooks for the demurrer. *Eccles* contra. The authorities cited were—2 Wils. 347; Barnes, 167; 3 P. W. 279; 1 Campb. 45, 55; 5 Ea. Rep. 294; 11 Ea. Rep. 46; 16 Ea. Rep. 30; 1 Chy. Cri. Law, 4; 2 Esp. c. 643; Chitty on Bills, 83.

ROBINSON, C. J., delivered the judgment of the court.

The objection which is made to the whole declaration in this case, on account of its informal conclusion, is a trifling one certainly, but it seems to us to be a good objection on special demurrer.

If the plaintiff had concluded in the common form, in a case where the conclusion by praying relief was more proper, the deviation would have been less material; but he has departed from the general form given by the rule of court, when the declaration is inconsistent with such a conclusion.

The first count, we have no doubt, is bad, for the substantial reason that it lays the promise to have been made in consideration that the plaintiff would forbear to prosecute the *qui tam* action, thus making it a condition precedent that he would forbear to prosecute, and yet he does not aver that he did forbear.

The other exception, that the consideration is illegal, we think also is a fatal exception, though that point is perhaps not quite so clear upon the pleadings. The only doubt is, whether it sufficiently appears upon the face of this declaration that the first action referred to was a penal action by a common informer. There is only the statement, that in that action the plaintiff was suing in debt, as well for her Majesty as for himself. That does not seem to us sufficient to shew that the plaintiff was suing as a common informer, and that he agreed on certain terms to compound the action. That would come within the prohibition of the statute 18

Elizabeth, chapter 5, of which the terms are extremely comprehensive; but then it is a question whether we could hold the consideration in this case to be illegal, without its appearing that such compounding was without the leave of the court, which is made an ingredient in the offence under the 18th of Elizabeth.

On the other grounds, however, our judgment is given for the defendant on the demurrer.

Per Cur.—Judgment for defendant on the demurrer.

ALLEN V. COY.

Meaning of the word "gable"—How far court will give a construction to the words of an instrument by intendment—Right of party paying the whole of an award to contribution, and his mode of enforcing it.

Where bonds or other instruments have omitted to say expressly to whom the money received by them is to be paid, the court, if this is plain from the context, will supply the words in the particular place they ought to have been by intendment, from the rest of the instrument.

Where an award directs two parties to pay each a certain sum of money to a builder, and one is obliged to pay the whole, from a refusal by the other to pay his share, the party so paying can compel contribution by suing the other in covenant for non-performance of the award.

This was an action of covenant for non-performance of an award. The pleadings were lengthy, but the only points that came up upon the demurrer were, first, whether, when the cost of "a gable wall" was referred by submission to arbitrators, was it within their submission to award a certain sum for the costs of "a cellar wall and gable?" secondly, whether, when the arbitrators awarded that the two parties should pay a certain sum each, as the cost of erecting the wall (naming the sum, but not saying to whom), and one of the parties paid the whole, upon the refusal of the other to pay his share, could he sue the other for his proportion in an action of covenant for not performing the award?

ROBINSON, C. J., delivered the judgment of the court.

We are bound to give to the agreements of parties a reasonable construction, and to find a plain meaning for them if we can, although they may not have expressed it with the same accuracy and precision that a pleader would do.

This agreement, I think, fairly imports that the plaintiff and defendant were in difference about a party wall, which

In ordinary phrase would be called a party wall between them, although it may have stood upon the land of one only. It would appear from the nature of the agreement, that this wall was to be a greater advantage and convenience to one of the parties than to the other; but in what proportions the cost should on that account be divided between them they could not settle themselves, and therefore left it in an amicable spirit to be determined by others.

It is true, "gable," in its proper technical sense, perhaps may mean only the end of the roof above the wall-plate; but it is plain these parties must have meant that the estimate of expense should include the whole end wall from the foundation, taking in the cellar wall.

In the recital in the instrument signed by the parties, they call it a "gable wall"—the arbitrators, more properly perhaps, speak of it as the "cellar wall and gable;" but they must both mean the same thing, for there could be no gable wall without a foundation to rest upon, and that forms necessarily a part of the expense of erecting the gable wall, whether the part below the ground be called gable wall or cellar wall. No one can doubt what is meant, and I see no repugnancy in this respect between the submission and the award, and do not consider that the arbitrators have awarded on anything that was not submitted to them.

Then, as to the other objections stated in the demurrer, the obvious meaning and effect of the award, in the absence of any explanation to the contrary, is, that each party was to contribute in the proportion named; and the plaintiff having paid, as he says, the whole charge, no matter to whom, has a right to sue as he does in this action, for the part which the defendant by the award is bound to pay.

I see no foundation for raising a question, unless we are determined to raise idle doubts, and perplex ourselves about what every one else would understand. There are many cases in the books, where bonds or other instruments have omitted to say expressly to whom the money secured by them is to be paid; but when it is plain from the context, the court supplies the words in the particular place where they ought to have been by intendment, from the rest

of the instrument. Several cases of this description are collected in the reporter's note to *Coles v. Hulme* (a).

It is true that for all the information the witnesses give us, the wall may have been contracted for by some person who was in the act of erecting it; but that need make no difference—one party or the other must have employed him. If the plaintiff did, he must of course have been bound to pay the cost, and then he has his remedy against the defendant for what he is bound to pay. If the defendant has paid his proportion of the cost to some builder employed to do the job, and if such payment would, under the circumstances, acquit the defendant, then he had nothing to do but to plead it, and that would have shewn a performance of the award; but upon what is shewn on this record, there is no reason to imply anything else, than that the plaintiff has paid what the defendant was bound to pay, and has a good right of action to compel a contribution.

Per Cur.—Judgment for the plaintiff on demurrer.

DICKENSON V. CLEMOW ET AL.

Proper mode of replying to a plea that A. B. is holder of the note, and not the plaintiff—Debt of third party not due, how far a valid consideration for a promissory note.

To an action on a note by payee against maker, the defendant pleaded that before the commencement of the suit, &c., the plaintiff endorsed to A. B., who then became the holder of the note, and to whom, therefore, the plaintiff was liable. The plaintiff replied by re-affirming that he was the holder of the note, and specially traversing that A. B. was the holder as the plea asserted. The defendant demurred. *Held, per Cur.*, replication good.

Semle, that a debt due by a third party, but not yet payable, may form a valid consideration for a promissory note.

Declaration.—Payee against maker of a promissory note.

2nd plea, That before the commencement of this suit, &c., the plaintiff endorsed the note to one Moss Dickenson, for a valuable consideration; that Moss Dickenson then became the holder of the note, and the plaintiff was liable to pay him, &c.

3rd plea, set out in effect that Moss Dickenson owed the plaintiff a debt, which was not due at the time of giving the note in the declaration mentioned; and that at the plain-

tiff's request the defendants gave their note for it, and that there was no other consideration for the note.

Replication to second plea—that the plaintiff at the time of the commencement, &c., was and still is the holder of the note; without this, &c., that Moss Dickenson was the holder.

Replication to third plea—that plaintiff took and received, and still holds the note, for a good consideration—to wit, the amount of the said note.

Demurrer to replication to second plea—because it was argumentative in its denial of Moss Dickenson being the holder of the note, &c.

Demurrer to replication to third plea—because it was only an argumentative denial of the consideration stated in the third plea.

Eccles for the demurrer. He cited 8 M. & W. 629; 2 U. C. R. 419.

Crooks contra. He cited 6 M. & W. 559; 8 M. & W. 629; 15 M. & W. 672; 8 Dowl. 356; 13 M. & W. 30; 1 Exch. 608; Chitty, jr. 262; 1 Moo. & Rob. 382; 1 Bing. N. C. 480, 481; 1 Harr. & Wol. 12; 1 M. & W. 425.

ROBINSON, C. J., delivered the judgment of the court.

The second and third pleas, to which the replications demurred to are answers, seem open to the exception that they ought to have been expressly confined to the counts upon the notes, which they are not. That exception, however, has not been taken.

The second plea seems well answered by the replication. It is precisely such a replication as the court suggested should be the answer to a similar plea in *Fraser v. Welch* (a). The plaintiff re-affirms what the declaration is taken to imply—that he was himself the holder when he brought this action; and he does not stop there, but specially traverses that Moss Dickenson was the holder, as the plea asserts.

The third plea, though it was not excepted to in the argument, seems to be no defence to the action; it is not clear what defence is intended to be made out by it. If Moss

(a) 8 M. & W. 629.

Dickenson owes the plaintiff a debt, and at the plaintiff's request these defendants chose to give their note for it, I take it such note is valid and binding upon them (a), and not the less so because the debt of Moss Dickenson was not then due. This is an engagement of the defendants' own, collateral to the other; they cannot be said to be discharged by time given to Dickenson after he had given the note—his situation has not been altered. The only question is, whether a debt due by a third party, but not yet payable, may not form a valid consideration for a promissory note. No authorities have been cited to the contrary. The creditor might well agree to discharge or forbear proceeding against the first debtor, if a third party would give his note for payment of the money at an earlier day. The replication to the third plea appears to be bad, but it is of no consequence to consider it.

Per Cur.—Judgment for plaintiff on both demurrers.

ROBERTSON V. MEYERS.

Trespass for false imprisonment—justification under writ of ca. sa.—replication that writ was set aside—evidence of grounds on which writ set aside—how far to go to the jury—evidence of the judgment of court—power of Judge at trial to go beyond facts proved on the trial, and refer to facts still uncontradicted that came before him, in setting aside writ of ca. sa.—variance in proof of the nature of the writ as alleged, al. test. ca. sa. alleged to be set aside in pleadings, and order proved to set aside ca. sa.

The plaintiff sued in trespass for false imprisonment—the defendant justified under a writ of *al. test. ca. sa.*—the plaintiff replied that after the said writ issued and before action brought, the writ was set aside by order of the court, and he then proceeded in his replications to state the grounds upon which the court had set aside the writ—the defendant rejoined that it was not ordered that the said writ should be, and that the same was not set aside in manner and form as the plaintiff alleged. *Held per Cur.*—That under these pleadings—the setting aside of the writ being in itself an answer to the defendant's justification—it was not incumbent on the plaintiff at the trial to go further, and prove that the grounds alleged in his replication were the grounds upon which the writ had been set aside.

In an action of trespass for false imprisonment, where the defendant justified under a writ of *ca. sa.*, and the plaintiff replied that it had been set aside before action brought, the Judge of Nisi Prius allowed the plaintiff to go into evidence of facts and circumstances previous to the arrest, with a view of shewing the oppressive conduct of the defendant in issuing the *ca. sa.*; and *held per Cur.*, upon a rule for a new trial, that such evidence was admissible, as affecting the damages, though not the right of action. *Held also*—that the counsel for the plaintiff had a right to read at the trial from the original judgment of the court in discharging the plaintiff from the arrest, and setting aside the *ca. sa.* on the grounds upon which the *ca. sa.* had been set aside.

(a) Chy. Bills, 72; 1 Str. 264; 1 Tyr. 84.

Semble also—that the judge at the trial—before whom the *ca. sa.* had been set aside after argument in chambers, with consent of parties, as if by the full court in term—and to whom the facts upon which the writ had been set aside had thus become judicially known—had a right to comment to the jury upon some of those facts which had been left uncontradicted, as well upon the trial as on the application in chambers, although such facts had not been again expressly brought out by the plaintiff in his evidence before the jury: in this case, however, the facts thus stated by the judge were afterwards withdrawn by him from the consideration of the jury.

Held also—that a verdict of 1,000*l.* against the defendant, under the circumstances of the case (as fully set out in the statement), though in the opinion of the court excessive, could not be set aside on that ground.

An alias test. ca. sa. is still a *ca. sa.*—and therefore where a defendant justified under the *alias*, and the plaintiff replied that the said writ had been set aside, and then proved a rule of court discharging the arrest under a *ca. sa.*, *Held*—no variance.

Trespass and false imprisonment.

The defendant is an attorney of the court, and justified the imprisonment under a writ of *alias testatum capias ad satisfaciendum*, issued upon a judgment obtained 22nd June, 1838, by Smith, Fuller and Dick, against the present plaintiff Robertson, for 302*l.* 4*s.* 8*d.* which writ he avowed he had taken out as attorney for the plaintiffs Smith, Fuller and Dick, on the 16th June, 1846, and had endorsed to levy 464*l.*, besides sheriff's fees, as due upon the said judgment, which was yet unsatisfied.

The plaintiff replied, that after that writ issued and before this action brought—to wit, in Michaelmas term, 10 Vic., by a rule of this court then made, it was ordered, “That the said writ of *alias testatum capias ad satisfaciendum* should be set aside, and the same was thereby set aside; and that the said writ was set aside on the ground that a certain agreement having been theretofore made and entered into between the now plaintiff and the said William Smith, Logan Fuller and James Dick, for the satisfaction and discharge of the said judgment in the plea mentioned, the performance of that agreement by the now plaintiff has been acquiesced in by the said Smith, Fuller and Dick, for a long series of years, and that it did not appear that any claim had been by them made upon the now plaintiff, or any notice given to him that it was the intention of the said parties to treat the said judgment as being in force; and that even if such claim had been made, the said parties had no right to pronounce upon the truth of the alleged breaches of that agreement and assess their own damages thereon,

and that the now defendant Meyers, who had become the purchaser of the said judgment, could still less take that course in their name, having unnecessarily placed himself in the situation of the said parties, buying up as a species of property a mere general ground of complaint, of which the parties themselves did not appear to have been sensible, or at least they had not shewn any intention to make them a ground of claim against the now plaintiff, whom they had to all appearance discharged."

The defendant rejoined to this replication, that it was not ordered that the "said writ of *alias testatum capias ad satisfaciendum* should be, and that the same was not set aside in manner and form as the plaintiff alleged."

Upon that question of fact alone the parties were at issue. It was proved upon the trial that the plaintiff Robertson was arrested on the 23rd July, 1846, by the sheriff's officer, on an *alias testatum ca. sa.* such as was set out in the defendant's plea; that he continued in close custody till 30th July, when he gave bail for the limits of the district of Victoria, which then were co-extensive with the town of Belleville; that he was detained under this writ upon the limits until the 3rd April, 1847, when he was discharged in consequence of a rule or order of court being made as of Hilary term, 10 Vic., in the cause of Smith et al. v. Robertson, in these terms, "Upon reading the rule made in this cause calling upon the plaintiffs and Adam Henry Meyers, Esquire, to shew cause why the writ of *capias ad satisfaciendum* issued in this cause should not be set aside, and why the defendant should not be discharged out of the custody of the sheriff of the Victoria district, upon the ground that the purchase of the judgment specified in the affidavit filed could not be sustained under the circumstances of the case; or why the endorsement upon the said writ should not be reduced to the sum of 100*l.*, or such other sum as the court might think right under the evidence; and why the defendant should not be discharged on the payment of such sum so filed, to abide the event of the suit in the Court of Chancery against the said Adam Henry Meyers; or why the endorsement should not be reduced as before stated, and

why the defendant should not be discharged upon payment of the sum fixed into this court, to be disposed of as the court may think right; or why the said writ should not be set aside on grounds disclosed in the affidavits filed, and why Adam Henry Meyers should not pay the costs of the application—it is ordered, that the said writ of *capias ad satisfaciendum* be set aside, and that the above-named defendant be discharged out of the custody of the sheriff of the Victoria district, and that the said Adam Henry Meyers do pay the costs of this application.”

Other evidence was given by the plaintiff, in order to shew upon what ground it was that the rule was made, and with a view also of shewing that the defendant, in keeping the plaintiff in custody, had acted in a vindictive and oppressive spirit, as well as from other improper motives.

Some of the evidence was objected to as inadmissible.

The case was tried before the Chief Justice at Toronto. One of the grounds of complaint urged by the defendant's counsel was, that his case was improperly prejudiced by statements being made by the Chief Justice in the course of his direction to the jury, of facts and circumstances as having been proved before him in the course of the judicial investigation which resulted in Robertson's discharge from imprisonment under the *ca. sa.*, but of which facts and circumstances no evidence had been given on the trial of this cause.

Objections were also taken as to the admissibility of some evidence that was given, and it was contended further that the issue was not proved, because the rule produced did not set aside any writ of *alias testatum ca. sa.*, but merely a writ of *capias ad satisfaciendum* in the cause, which must be taken to mean the first *ca. sa.* that had issued.

The trial resulted in a verdict for the plaintiff for 1,000*l.* damages.

Cameron, Q. C., obtained a rule to set aside the verdict, on the ground that improper evidence was admitted, and that the jury were misdirected, and because the damages were excessive. *Hagarty* and *McDonald* shewed cause;

the cases cited were—2 M. & G. 721 ; 12 L. JI. N. S. 368, Exch. ; 1 C. B. 841 ; 4 Q. B. R. 852 ; 1 C. B. 183 ; 15 M. & W. 191 ; Graham on New Trials, 9th chapter.

ROBINSON, C. J.—As to the technical objection last mentioned, I considered that an *alias testatum* writ of *ca. sa.* was still a writ of *ca. sa.*, and was not improperly called so, and that the evidence shewed plainly that the writ of *ca. sa.*, which was in fact set aside by the rule, could be no other than that under which Robertson was at the time of the application in custody ; and therefore, that it was proved that that writ of *ca. sa.* (which was an *alias testatum ca. sa.*, though not so designated in the rule) was set aside, as the plaintiff's replication alleges. That objection, therefore, was overruled by me.

I have since met with a decision precisely in point, in a case of Foster v. Jackson, reported in Hobart, 54, in which the objection was—that an averment that a party had been taken upon a *capias*, was not proved by shewing that he had been taken on an *alias capias* ; but the court held that the averment was well proved. They said that the substance was "*capias*," whether it was the first, or an *alias* or *pluries*, which were but distinctions of number. That there might have been more color if the defendant had pleaded it as an *alias capias* when it was the first, for then the allegation would not have been true in words, though as to the effect of the execution it had been all one ; but here, they said, it is full in the substance and is not untrue, nor so much as mistaken in a word ; for an *alias capias* is a *capias* with a little addition that may be spared—for that *capias* is the genus of which the *alias* is a species.

As to the reception of evidence which the defendant objected to as inadmissible—it was evidence brought for the purpose of shewing why the court had discharged the defendant Robertson, and had set aside the writ. I held that evidence brought for that purpose was admissible—first, because the defendant Meyers had traversed the plaintiff's replication which brought that expressly in issue, and therefore, though the grounds on which the *ca. sa.* has been set aside might not form a material part of the issue indispen-

sable to be proved, yet I could not say that evidence upon it was irrelevant ; and besides, I considered that in any such case of an alleged trespass, it is not irrelevant that the jury should know whether the defendant, a practising attorney, had rendered himself inadvertently liable to an action by some mere slip in practice in a case where the plaintiff might have been justly imprisoned, and could have been imprisoned without any redress and without any wrong being done to him, if there had not been some accidental error in the process, or in the mode of suing it out or acting upon it ; or whether, on the contrary, it was not a case in which he had sued out a writ and had the parties imprisoned, when he knew that such imprisonment must be illegal, and that there could be no just pretence for it. Such evidence, it appeared to me, could not be properly excluded, inasmuch as it affected the claim to damages, though it could not go to the right of action. Just as in a case of trespass for an assault, a trivial injury only might have been received, so far as the mere force of the blow was to be regarded, and one that might be properly compensated by nominal damages only ; but if it could be shewn that the blow, though light, was given deliberately, and from a preconceived intention to insult the party in the presence of others, or in any other manner that would make the assault peculiarly offensive, such circumstances of aggravation ought to be allowed to enhance the damages ; and therefore, if justice is to be done, evidence must be received of them. The same consideration seemed to me also to apply to the evidence which was brought forward and which I received of the defendant's own declaration to third parties, tending to shew that he was determined to make use of the power which he thought he had acquired of imprisoning Robertson, in order to gratify an ill feeling which he admitted he had against him on account of some alleged interference of Robertson in his affairs.

It was objected further, that the sheriff had failed in proving his replication, for that he had not shewn the *ca. sa.* to have been set aside for the reasons stated in his replication ; the rule produced did not express on what particular grounds it had been granted.

As to that, I held that a party is not bound to prove all the particulars of his plea, but only so much as is necessary to make it a good answer to the previous pleading ; but the substance of the issue in this case was, whether the writ under which the defendant justified had been set aside. If it had been, then it could not avail him as a defence, and anything further was unnecessary to be stated or shewn in order to determine whether there was a right of action.

I considered that the allegation of the grounds on which the writ has been set aside, was not so made as to be strictly descriptive of the rule which had issued ; but the rule, in fact, assigned no ground, and therefore did not contradict the allegation ; but having been moved on several grounds, and also in general on the grounds disclosed in affidavits filed, and the court having made it absolute without specifying in the rule itself on which of the grounds they had proceeded, it was a matter capable of proof (if necessary to be proved), by evidence *aliundè* of the grounds and reasons assigned by the court ; and if those grounds were either not shewn at all, or were not shewn to have been such as the plaintiff in his replication alleged, still the plaintiff would be entitled to recover if he proved the writ set aside, that being the substance of the issue and the grounds being unnecessarily stated.

Another objection on which this verdict is moved against is, that the damages are excessive. They are very large certainly. The plaintiff Robertson was one week in close custody in the gaol under the writ illegally sued out, and was afterwards, from the 30th July to the 3rd April, eight months and upwards, confined upon it to the limits, which, as the law then was, disabled him from leaving the town of Belleville. The plaintiff was stated by the witnesses to be an old magistrate of the district in which he lived, neither of the parties being an inhabitant of the Home district, they were strangers ; and, so far as I know, to most of the jurors who tried the cause, probably to all of them. The jury may have imagined the actual pecuniary damage of such an imprisonment to the plaintiff greater than in fact it was. It is hard to make any computation in such cases, and it is perhaps seldom attempted.

Where the imprisonment has been wrongful, merely by reason of some clerical error or some trivial injury, as in a case in which there was a right to imprison and where nothing wrong was intended, it would be just to make the damage actually suffered as nearly as possible the sum to be allowed in recompense ; and indeed, if in such a case nominal damages only should be given, the court would scarcely interfere with the verdict on that account ; but when a substantial injustice has been done in an oppressive spirit, or from a bad motive of any kind, then it is not to be expected that a jury will confine themselves to any such principle of mere computation of the injury suffered in a pecuniary point of view.

I expressly told the jury in this case, in the course of my charge, that it was always to be regretted when a jury gave an extravagant verdict, such as could be properly called intemperate, whatever view might be taken of the conduct of parties ; and without pretending to discuss what amount it might have been proper in such a case as this to give, I will only say that I did not suppose the verdict would have been so high, and that I should have been better satisfied if it had been less. At the same time, I do not speak of it as disproportioned to the defendant's conduct in the transaction. It is probably a good deal beyond the amount of any injury that the plaintiff Robertson really suffered in consequence of the imprisonment ; but there are many cases in the books in which the verdict has been as much disproportioned to the injury, taking it only in that point of view, but in which the courts nevertheless have declined to interfere.

I am not in favour, myself, of setting the verdict aside on that ground. I think the wrong done was such as to warrant exemplary damages on several accounts, and that we should not relieve from the verdict on the ground of its being excessive. In this case, as in all others, I consider that the court has a discretion to interpose on that ground, if they should consider that the facts called for it ; but my opinion is, that in the proper exercise of our discretion we should forbear to set this verdict aside merely as being excessive.

The ground on which I think the defendant's counsel

most strongly relies for relief against the verdict is, that it was probably given for a much larger sum than it otherwise would have been, in consequence of my having at the time dwelt upon some circumstances, in my charge to the jury, which did not form part of the evidence given in the cause.

If anything was irregularly done in that respect which ought, in the opinion of the court, to prevent the verdict being allowed to stand, the defendant without question should have the benefit of a new trial; because, whatever view it may be proper to take of the transaction, the verdict is for too large a sum to make it right that it should be enforced, if anything took place on the trial, however unintentional, which can be said to have had the effect of placing the defendant's case unfairly before the jury. But for my own part, leaving even out of view the consideration that the defendant is an officer of this court, of which we are the judges, bound so far as we can to keep him within the proper line of his duty, and that we are bound in many cases to afford suitors protection, even by summary interference against the misconduct of attornies, I do not see that the defendant has in this case any reason to complain of what occurred at the trial.

I do not know that it would have been better for the ends of justice, though it would have been more agreeable to myself personally, if this trial had happened to have taken place before some one of my brothers who had not been called upon, as I was, to investigate and decide in an earlier stage upon the very facts out of which this action arose.

It is seldom difficult for a judge to banish from his mind during a trial all recollection of statements and circumstances which he may have heard merely as matters of public rumor in common with the rest of the world. It is not so easy for a judge to divest his mind of matters which have been judicially investigated before him and determined upon by him in proceedings between the several parties, and when those parties have been fully heard; and whether indeed, he ought to affect ignorance of such matters is not always so clear, as in the argument of this case it was assumed to be.

I will state the facts, of which the knowledge was inevitably forced upon me in the course of regular judicial proceedings, and then the bearing of the objection will be understood.

The defendant in this case is an attorney of this court. There had been a judgment in an action of assumpsit entered in 1838, at the suit of Smith and Company against Robertson now plaintiff, for a large debt. The plaintiffs, Smith & Co., were merchants residing in Montreal; Robertson was a merchant carrying on business at that time at the River Trent, in the district of Newcastle. Many years elapsed since anything was done upon this judgment, when on the 16th June, 1847, a writ of *ca. sa.* was taken out by the defendant in this cause, Mr. Meyers, as attorney for Smith & Co., and endorsed with a direction to the sheriff to detain Robertson for 464*l.* Though it was taken out then, it was not delivered by the defendant to the sheriff till the 23rd July, when Robertson was arrested under it and imprisoned, and on the 30th July he gave bail and was admitted upon the limits. Trinity term commenced a few days afterwards, and an application was then made to this court, founded upon several affidavits, strongly implicating the conduct of the attorney, in a charge of abusing the process of the court, in a manner which could not but be held to be clearly illegal and oppressive, if the statements should be substantiated. It was moved in full court, not in the Practice Court, and a rule was granted in the form already stated, a copy of which was produced on this trial. For some reason not known to the court, they were not pressed to make the rule absolute on the return of it, but the matter was allowed to lie over upon some understanding between the parties till Michaelmas term, and afterwards till Hilary term. The attorney being a member of the assembly, it was stated on some of these occasions that he was unavoidably absent, and that it was not desired to press it till he could be prepared to answer. About the end of Hilary term, the rule not being yet spoken to, it was arranged between the counsel for both parties, as is often done in such cases, that the matter should be argued by consent

before a judge in chambers, whose decision should be submitted to as the decision of the court. It came on accordingly on the 3rd of April, 1847, on a day when I happened to be the judge in chambers. Counsel were heard on both sides. The affidavits filed on moving the rule had been answered by affidavits filed by the attorney who is now defendant in this action; and upon the facts stated on the part of Robertson, and not repelled by the attorney, I felt bound instantly to make an order discharging Robertson and setting aside the writ, and to direct that the costs of the application should be paid by the attorney. In giving the judgment which I did on that occasion, I acted in the place of the court in banc, giving the judgment by consent as of the preceding term; and in order that the grounds of the judgment might be fully known, I made a minute of it, as is usual with us, and gave it to the reporter, which I suppose was not published with the judgments of the term, only because it was not pronounced in fact by the court in term.

The grounds on which I set aside the writ were in substance these: Smith & Co.'s judgment having been entered in 1838, it appeared that in March 1840, they made an arrangement with Robertson, through their agent in this province, and with the assistance of Mr. Kirkpatrick, who, as their attorney, had obtained that judgment, and also another judgment against Robertson for a less sum, at the separate suit of Dick, one of the partners. Robertson agreed to assign to them certain lands in satisfaction of these debts; also to assign to them a mortgage in fee which he held; and it was agreed then, and a formal writing was executed to the effect, that upon Robertson's perfecting the assignments which he undertook to make, the judgments should be considered satisfied, and he was to receive a discharge. He was to make his transfer and shew titles to the satisfaction of Mr. Kirkpatrick, the plaintiff's attorney; and among other things, he undertook that for a certain leasehold property, which he held by lease from the crown, he should procure a freehold title, it being a clergy reserve, open to sale by the government upon pay-

ing the estimated value; and Robertson was to pay the price necessary for obtaining the title. In the action brought against Robertson by Smith & Co., Mr. Meyers had been Robertson's attorney. Robertson proceeded to perfect the titles, and make the conveyances agreed upon, and corresponded with Mr. Kirkpatrick from time to time about them. For some of the lands which were to be transferred, Robertson executed deeds, and deposited them in the office of the county registrar, to be registered, and to remain there, subject to Mr. Kirkpatrick's order, reporting to Mr. Kirkpatrick that he had done so. Mr. Kirkpatrick referred to Mr. Meyers (although he was Robertson's attorney) to examine the titles and report to him if they were complete, and it was reported by Mr. Meyers that they were correct. All that was required for carrying into effect the agreement made between Smith & Co. and Robertson in 1840, was carried into effect substantially—at least so as to satisfy Mr. Kirkpatrick—except that the leasehold property in the clergy reserve had not yet been turned into a fee, Robertson having fallen short in the means he had provided of paying for it to the government, in consequence of the government having by a recent regulation declined to accept land scrip in payment for clergy reserves. Mr. Kirkpatrick, however, acting in the matter for Smith & Co., had not treated the agreement as at an end on account of the delay in fulfilling this part of it, but had corresponded with Robertson and with Smith & Co., reporting from time to time how the affair stood, and they had intimated no disapprobation of what he had done.

It happened that some time after, Smith & Co. brought an action against Robertson, upon notes which he had endorsed; and he contended that these also were included in the settlement made in March 1840, and defended the action on that ground, which, however, he could not establish, and a verdict went against him for it. But, in order to endeavour to make out this defence, he employed Mr. Meyers as his attorney to go to Toronto, where the case was tried, and to take there all such evidence as might be material for him. On that occasion Mr. Meyers, it was alleged, went to the registry office and got from it, as on

the behalf of Robertson, one of the deeds to Smith & Co., which he had left there to be registered, and to be kept there till called for by Mr. Kirkpatrick. This was a deed which Robertson had procured to be made direct from one Weller and his wife to Smith and Dick, of land which Robertson had procured to be made direct from Weller and wife, but of which no deed had yet been made by them. The land was the real estate of the wife, who was now dead, and had never been examined respecting her consent to alienate.

Mr. Meyers having thus, as it appeared, obtained information of the fact that there was this blot in the title, became also aware that that part of the agreement which respected the clergy reserve had not yet been fully carried into effect by Robertson; and further, that out of a lot of one hundred and fifty acres, which was one of the lots transferred, there had been an acre sold as a village lot by some third party before Robertson got it. Both the latter deficiencies were known to Mr. Kirkpatrick, and had not been made the ground of rescinding the settlement and proceeding upon the judgment, or of any threat to do so; but Smith & Co., leaving the matter in their agent's hands, had acquiesced in his view of it, and were waiting amicably upon Robertson in regard to anything that remained unfinished, and seemingly quite willing to waive whatever Mr. Kirkpatrick had not thought it necessary to insist upon.

While matters were in this state, Mr. Meyers, who had been Robertson's attorney in the suit of Smith & Co., became in the mean time involved in disputes with Robertson, with whom he had transactions in business for many years; and it appears he went to Montreal and procured an assignment from Smith & Co. to himself, of the judgments which they had held against Robertson, and which were intended to be settled by the agreement made in 1840; and then, without any communication with Robertson, his former client, and solely of his own accord, he sued out, on the 16th of June, 1846, a writ of *ca. sa.* on the judgment, and endorsed it with a direction to take the body of his former client Robertson for 464*l.* The sum endorsed was

a purely imaginary debt—a sum arbitrarily assumed by him as his own estimate of damage in regard to such parts of Robertson's agreement with Smith & Co. as he considered had not been fulfilled. He valued the acre sold as a town lot at so much—the damage by reason of the defect in Weller and wife's transfer at so much—and added what he chose for the difference between the clergy reserve being a leasehold or freehold property; and having thus assumed the breaches proved, and assessed damages for these breaches at such sum as he pleased, he directed that sum to be levied as if it had been ascertained by judgment of the court in a suit between Robertson and Smith & Co., in whose name he sued out this process as their attorney. Before he made use of the process, however, and after he had obtained the assignment of the judgment, he was engaged in an attempt to settle amicably his own accounts with Robertson, and gave no intimation of what he had done till he had got Robertson to make some admissions which were important to the adjustment of these accounts. He then made him aware that he had him in his power; and, desiring to obtain something further from him, which the other was unwilling to accede to, in settling their old accounts, he threatened him with imprisonment upon this process, naming a day by which, if Robertson did not comply, he would make use of the *ca. sa.* At length, after he had held the account some weeks in his hands, finding Robertson still unwilling to do what he required, he delivered it, thus endorsed for 464*l.*, to the sheriff; and he seems to have thought it an extenuation of his conduct to state, as he did in his affidavit in answer, that he did this not really with any view of enforcing the payment of that as a debt due to him, but as a means of bringing Robertson to his terms.

This is an outline of the case, with nothing that I could see to mitigate whatever may seem improper in it, but with several circumstances stated and apparent in the papers and correspondence produced, to give a more unfavorable coloring to the attorney's conduct than I have here represented it. The reasons which I gave publicly after argument in disposing of the rule nisi were founded on this

state of facts, gathered from the documents before me, from admissions in a long affidavit made after some months' delay by the attorney himself, and from statements made in the affidavits supporting the complaint, which his affidavits left wholly uncontradicted.

Upon the trial of this case which we are now reviewing, when the plaintiff's counsel was opening his case to the jury, he was going on to state why the writ of *ca. sa.* had been set aside. He held in his hand, as he said, all the papers which were before the judge when the rule was made, and he began to read from the written note of my judgment, which I had given to the reporter at the time, the grounds on which the order was then publicly stated by me to have been made.

The defendant's counsel objected to this, contending that nothing could be received in evidence but the mere fact that the writ was set aside by the rule which was made for that purpose; and therefore that, as the plaintiff could not give in evidence the judgment of the court, he was not at liberty to read it and comment upon it in addressing the jury. It was not clear to me that when the plaintiff came to his evidence, I could refuse to let him shew on what ground the court, after hearing the parties fully, had set aside the writ and discharged Robertson; and as to his not being allowed to read to the jury and remark upon the public judgment of the court, setting forth the grounds on which it had acted, I had seen this so often done without comment or objection, after new trials awarded, and sometimes even judgments in cases between other parties read in order to shew in what light the court had looked upon similar transactions, that I felt I should be taking an unusual course if I restrained the plaintiff's counsel in this case; for I consider that if the facts had been of an opposite character, and the writ had been set aside upon any captious objection on account of some trifling mistake which made it irregular, and if at the time I gave effect to the objection I had happened to express my reluctance in doing so, and my conviction that the attorney had intended nothing wrong, and that the plaintiff had acted vexatiously in

taking advantage of such an irregularity—I had no doubt, I say, that if this had been the complexion of the case, the defendant's counsel would have thought it very material to read to the jury from the report of the case any such expression of the court, in order to impress them with the opinion that the plaintiff should only recover nominal damages; and I think in doing so, he would not have been interrupted by the opposite counsel, nor checked by the court. I did not therefore prohibit the plaintiff's counsel from reading the note of the judgment, cautioning him, however, at the same time, that while I could not deny him the right to manage this case as others were managed, nor to produce any evidence which I could not see upon some clear ground was inadmissible, yet he must act at his peril in advancing any evidence about which a doubt could be raised; because if, upon mature consideration, such evidence should appear to us to have been improperly received, it would most probably deprive him of the benefit of his verdict.

The plaintiff's counsel then proceeded with his case; and after proving the imprisonment, and proving also, as I have before stated, several declarations of the defendant, made to third parties, of his determination to urge his advantage over Robertson to the utmost, in retaliation for some conduct of his of which the defendant complained, he called Mr. Kirkpatrick as a witness, who gave a narration of the transaction so far as his knowledge extended. He did not know, he said, how Mr. Meyers had become possessed of the deed from Weller and wife, which had been left in the registry office; but those facts which I have already stated, and with which Mr. Kirkpatrick was connected, he swore to very distinctly and positively.

The defendant's counsel objected to this evidence of transactions previous to the arrest. I admitted it, as bearing upon the question of damages, by shewing that the defendant's conduct had been substantially wrong, and that he was not merely answerable as a trespasser on account of some error of his own, or of a clerk's duty in filling up the writ. I thought the plaintiff had a right to shew the spirit in which the defendant had acted in the matter.

The defendant called no witnesses. In summing up to the jury, I felt it proper to explain to them, with a view of setting the administration of justice right before them, how it happened that in a case where so flagrant a wrong had been committed in imprisoning a party in a civil suit for a demand which there was clearly no right to enforce in that manner, the party imprisoned had been left so long in custody—no less than eight months—after the matter had been brought before the court. They were told that it was because the parties had, for their own convenience, postponed the argument, and not because the court had any doubt upon the propriety of discharging the defendant in the suit, which was done without delay after the rule was answered. It was felt by me also to be due to this court to state what the circumstances were which had hitherto made it proper for the court to abstain from taking, of their own suggestion, and without any application made to them for that purpose, such notice of the defendant's conduct in this matter as an officer of this court, as might be thought unavoidable in such a case; and I then gave the jury my impression of the defendant's conduct in the matter, assuming the writ to have been properly set aside for the reasons given by me in the judgment which had been read to them, and assuming that the facts had been such as they had been judicially ascertained to be after hearing the defendant upon oath, and any evidence on his behalf which he desired to offer in answer to the charges of which he had been long in possession. In doing so, I reasoned upon one or two points which, though publicly stated by me in giving judgment as my reasons for setting aside the writ, were not brought out in Mr. Kirkpatrick's evidence, nor in the evidence of any other witness sworn upon the trial. Mr. Cameron, who managed the defence, did not interpose while I was giving the case to the jury, being reluctant, no doubt, to interrupt me; but when I had finished, he took exception to those parts of my charge in which I had adverted to circumstances in the defendant's conduct in regard to which no evidence had been given upon this trial; and he urged very strenuously, as he was at liberty to do,

that those were observations beside the case. It was not my intention at the time to have adverted to anything beyond what was disclosed in the evidence of Mr. Kirkpatrick, which opened the main facts to the view of the jury ; therefore, in order that I might free the case as much as I could from any ground for exception, when Mr. Cameron made his objection I requested him to particularize in what respects I had referred to matters not appearing in the evidence ; and this being done, I detained the jury till I had carefully read over to them again all Mr. Kirkpatrick's evidence, and I requested them to dismiss from their minds any point connected with the defendant's conduct which had not been sworn to by Mr. Kirkpatrick ; and after the jury had this impressed upon their minds as clearly as I could impress it, they retired to consider their verdict. I thought at the time that in taking this course, I used more caution than was strictly necessary, and I think so still. The act of setting aside the writ, which left the defendant a trespasser, was a judicial act. The investigation which led to it was an open and public one before the proper tribunal, at which the defendant had been fully heard after ample opportunity to answer, and he was bound by the result. The grounds on which the judge acted in setting aside the writ, were not facts assumed without enquiry, or after only an *ex parte* proceeding : they were facts ascertained by a regular investigation, to which the party had submitted, and which was conducted according to law. He did not attempt on the trial to disprove anything that had been assumed in the judgment referred to ; he did not offer to shew that the writ had been set aside on any other ground, nor to make any attempt to disprove what he had admitted in his own affidavit, filed in answer to the application, or what had been treated on that occasion as established, inasmuch as it had been stated on oath, and had not been denied by him.

If I could have stated to the jury, with truth, that I had set aside the writ for no other reason but because there was a mistake in the teste, or because it had been issued in haste without a seal, I should assuredly have made a point

of stating it in justice to the defendant ; and it was equally due in justice to the plaintiff, that when the fact was that the writ had been set aside for very different reasons from those, that fact should be considered and should have its due effect in disposing of the cause.

There is a case in England, in which, on a trial for perjury committed in the trial of a cause, when the evidence was read, as taken by a short-hand writer, of what had been sworn by the defendant on the trial, it was desired by the prosecutor's counsel that the notes of remarks made by the judge who presided at the first trial should also be read, shewing the light in which the evidence then given had struck the judge at that trial. Mr. Justice Littledale, who presided at the trial for perjury, allowed the judge's remarks to the jury to be read ; but on a subsequent occasion, when a similar question arose before Lord Denman, and Mr. Justice Littledale's decision was cited, he said he should have paused before he allowed the remarks of the judge on the first trial to be read.

So far as the authority goes, we have here the act of Mr. Justice Littledale, who was a particularly cautious judge, in favour of admitting, against the doubt expressed by Lord Denman whether it was right to admit it. I confess I think Lord Denman's view of the point is the more correct one, and that it would have been better not to have admitted the remarks ; because those were mere remarks addressed by the judge to the jury upon the probability of the witness's statements, which it was not his duty but the duty of the jury to determine. What the counsel for the plaintiff in the case before me read to the jury was the ground assigned by the judge acting for and in the name of the court, on which a certain decision was come to, which decision he was pronouncing, after an investigation to which the parties had submitted, and in which they had been heard, and in a matter which it had become his duty judicially to determine.

When I was first asked to restrain the counsel for the plaintiff from reading the minute from the judgment in his remarks to the jury, the objection took me by surprise, and

did not seem reasonable; for I had not only heard passages from the printed judgments of the court frequently read in trials at *Nisi Prius*, but I reflected that by a public act of parliament, the courts are obliged to see that their judgments are correctly reported; and as this was agreed to be received as the judgment of the court, though given in chambers by consent, I looked upon it as standing on the same footing. My own written note of the judgment was handed up to me on the bench, which I of course knew to be authentic, and that if it were questioned when the time of giving evidence came, it could most easily be proved, though perhaps if appealed to, and proof had been insisted on, I ought to have recognized it as authentic evidence, not of any act done by the defendant, but simply of the grounds on which the prisoner had been discharged—on the same principle that we are bound to notice some signatures and official acts without proof, as things of which we are supposed to have judicial knowledge. It would seem strange that I should be required to recognize the signature of a county registrar, or a notary public, or a brother judge, upon production in court, and should yet not recognize my own written judgment as evidence of the fact that I had set aside a writ on certain grounds by a public judgment such as a statute of the province requires shall be authenticated and published. There was, however, no question about the regularity of proof of this judgment, for the defendant's counsel admits that he dispensed with any formal proof of the minute of the judgment produced.

If the attorney could have shewn that any of the grounds which were by that judgment made the grounds of setting aside the writ did not in fact exist, and that they had by mistake or otherwise been erroneously assumed against him, he would, we must suppose, have offered to shew either that the writ was set aside on other grounds, which was not pretended, or that in fact his conduct had not been such as, upon a proper judicial investigation, it had been found and assumed to be. Doing neither, and offering no proof himself, or explanation of the grounds on which the debtor had been discharged from custody, he stood at least

in the situation of a person who had caused another to be imprisoned for more than eight months without any justification whatever, and without any cause. Whether, considering the other evidence given upon the trial, and not objected to, a jury would or would not have thought the damages which they gave too high for such an injury, it is impossible for us to know. But the defendant seemed to me to stand in a less favourable situation than that; for he stood in the position of a person who, having caused another to be imprisoned by process of the court, had been complained of in regard to his conduct in suing out that process, and complained of not upon frivolous but upon substantial grounds; and who, after his account of the matter had been heard on his oath before the proper tribunal, had been adjudged to pay the costs of the application for the prisoner's discharge, for reasons openly stated in court, which reasons were averred in the declaration in this cause to have been the grounds on which the process had been set aside, and were not now attempted to be in any manner disproved.

I had received from the investigation which took place before me a very unfavourable impression of what appeared to have been the conduct of the defendant as an officer of the court, and expressed my disapprobation of it upon the trial in strong terms. We must suppose that such remarks may have had considerable influence on the opinion which the jury were to form of the damages proper to be given; and if anything was done at the trial which my colleagues, upon deliberate consideration, think ought not to have been done, I should by all means desire that the defendant should not be concluded by a verdict given under those circumstances.

For my own part, I do not see that anything was done of which the defendant has a right to complain; but as the damages are large, I would certainly not decline to concur in a rule granting a new trial, if my brother judges thought the trial had been in any respect misconducted; for I think it would be in that case right to do so.

DRAPER, J.—After repeated consideration of the nume-

rous authorities which bear upon the different questions raised in this case (*a*), I have been unable to find sufficient ground for disturbing this verdict; though, in the exercise of my own judgment on all the facts, I should not have concurred in giving such damages. Giving every weight to the relation of attorney which the defendant at one period held to the plaintiff—to the knowledge acquired in that character—to the subsequent purchase of the judgments previously rendered against the plaintiff—and to the advantage endeavoured to be gained, and to the use endeavoured to be made, of those judgments, coupled with the knowledge of the plaintiff's situation in regard to an arrangement entered into for selling them—I feel strongly that a verdict of 1000*l.* is, under the circumstances of this country and the general difficulty of raising money, even where a man has property, a penalty much heavier than I should have inflicted. For, strictly viewed, this is an atonement only to the plaintiff, for the injury he has sustained by the false imprisonment. It is no bar to any other claim which the plaintiff may have, arising from the relation of attorney and client; and the liabilities resulting from that relation, as to the purchase of the judgment. Nor do I see that if the

(*a*) Cases to shew that though topics not in evidence were alluded to by the judge in charging the jury; yet, as he cautioned them afterwards against being so influenced, and read over to them the evidence on which they were to act, it is no ground for new trial.—3 Wil. 19; 3 Chit. Gen. Pr. 9, 10, 11; Davidson v. Stanley, 2 M. & Gr. 721; Rex v. Sutton, 4 M. & S. 532.

Cases on excessive damages.—2 W. Bl. 929, 942, 1327; 2 Wils. 244, 386; 2 Stark N. P. C. 404; Williams v. Currie, 1 Com. B. 18; 1 M. & Gr. 222; 7 Bing. 316.

As to court's observations on a former occasion being admissible.—See Barker v. Angell, 2 M. & Rob. 371; 6 Jur. 265; 11 Jur. 544.

As to variance ca. sa. or al. ca. sa.—Foster v. Jackson, Hob. 54; Fisher v. Magnay, 5 M. & Gr.; 4 B. & C. 625, 635.

As to issue of writ being set aside modo et forma.—Co. Lit. sec. 483, 2816; 15 Vin. 418; Hard. 39, 43; 1 B. & B. 536; and see North v. Wakefield, 13 Jur. 731, and the cases there cited; Brown v. Jones, 15 M. & W. 191; Prentice v. Harum, 4 Q. B. 852; 8 Ad. & E. 449; 1 C. B. 183; 13 Jur. 812.

As to stating objections in a rule, or pointing them out by reference to affidavits.—See 3 Chit. Gen. Pr. 580.

Admissibility of affidavits used by defendant.—Long v. Champion, 2 B. & Ad. 284; Crook v. Dowling, 3 Doug. 75; Cameron v. Lightfoot, 2 W. Bl. 1191; Buckell v. Hulse, 7 A. & E. 454; Gardner v. Moulton, 10 A. & E. 464; Cole v. Hadley, 11 A. & E. 807; 6 Q. B. 567; see also Prince v. Sams, 7 A. & E. 627; 12 Jur. 899; 7 C. & P. 324; 1 C. & Ker, 266.

Admissibility of C. J.'s minute.—20 Howell's St. Trials, Duchess of Kingston, 8 M. & W. 384; 3 B. & C. 235; Lord Bagot v. Williams, 1 M. & Rob. 228; 3 Q. B. 342; 4 Q. B. 93; 7 Q. B. 387.

matter were brought before this court on the independent footing of a complaint against one of its officers for misconduct in his professional character, that we should be at liberty to treat this verdict as a satisfaction for the offence, or as relieving this court from the duty of dealing with it, without reference to the amount of the verdict given.

I have felt it to be extremely probable that the jury, in giving such exemplary damages, not only had in view compensation, to which the plaintiff was well entitled, but punishment, which they thought the defendant justly merited; and, not aware that he could be rendered liable in any other form, either to the plaintiff or to the authority of the court, they may have consequently given heavier damages, thinking that it devolved on them to punish what the judgment of the court had previously condemned. But I am not warranted by any thing that appears from acting on this assumption as being well founded; and even if it were clear that such consideration influenced the verdict, it would be still almost impossible to set it aside on the ground of excessive damages, without directly impeaching the authority of numerous cases.

Nor have I been able to find authority to sustain the objection, either as to the admission of improper evidence, or for misdirection. On the contrary, I have arrived at the conclusion that the affidavits used on the application before the court were admissible; either as shewing the grounds on which the arrest was set aside, although not as evidence of the facts, which were otherwise sufficiently proved at the trial, or as to the defendant's own affidavit, as a statement or admission of facts pertinent to the issues, and as to the affidavits filed against him, as shewing to what allegations his statements and admissions referred. And as to misdirection—conceding, for the sake of argument, that the charges to the jury in the first instance alluded to some matters not then strictly in evidence, this was corrected before the jury left the court, and they were carefully told what was before them, and on which alone their finding should be based—I still, however, regret the largeness of the verdict; and especially because I view the defendant's

conduct, as it appears on the whole evidence, as deserving of censure and punishment, and I do not desire that too great a severity should lead to a sympathy for the offender, which may tend to lessen a proper feeling of condemnation for the offence.

Per Cur.—Rule discharged.

DOE DEM. SHELDON V RAMSAY ET AL.

Ejectment—Right to go into the question of boundary, when plaintiff's title to some portion of land sued for admitted—How to cure inadvertence of defendant in putting into consent rule some land to which plaintiff is entitled.

In ejectment, where the plaintiff proves his title to the possession as to any part of the premises sued for, he must obtain a verdict, and the court will not go into the question of boundary in order to determine the precise quantity of land he is entitled to recover.

Where it turns out that the defendant, from inadvertence, has admitted himself in the consent rule to be in possession of some of the land to which the lessor of the plaintiff is clearly entitled, and so has had a verdict pass against him, the court will grant a new trial on payment of costs, with leave to amend the consent rule.

This case was tried before the Chief Justice, at Hamilton. The question intended to be brought before the jury was one of boundary. The lands had been described in certain deeds under which the lessor of the plaintiff claimed, by referring to the supposed point of intersection of the bank of the Grand River by a line of which the course was stated in the description.

Where a line running in that course would strike the river depended upon the point from which such line was to be produced, and that again must have depended upon the precise position of the part from which the description in the deed was made to commence, this point was in dispute between the grantees, and there was an extraordinary bend in the river near the premises in question, from which it happened that according as the line referred to should commence to run from the point which the plaintiff contended for, or from that which the defendant maintained was the intended point of departure, it would strike the river at such different points that in one case the description would embrace upwards of three hundred acres more of land than it would in the other.

But before the evidence was entered into, the defendant's counsel stated that he felt it proper to admit that, taking the description as either party would have it, the defendant

could not be denied to be in possession of some portion of land which would clearly be embraced within the plaintiff's title, and that the plaintiff had therefore an indisputable right to recover for some land, though perhaps only for two or three acres. This was owing to an inadvertence in framing the consent rule which was so drawn up as to embrace a small piece of land to which the defendants had no claim, and of which they admitted themselves by the rule to be in possession.

On this being stated, the Chief Justice directed a verdict to be entered for the plaintiff, as it could be of no use under such circumstances to go into the question of boundary.

The defendant, by *Galt*, moved for a new trial on payment of costs with leave to amend the consent rule.

The plaintiff, by *Cameron*, Q. C., objected to this, contending that such application was without precedent, and that the plaintiff must be allowed to take possession at his peril.

ROBINSON, C. J., delivered the judgment of the court.—It is quite clear that in England, where the plaintiff proves his title to possession as to any part of the premises sued for he obtains a verdict, and the court will not go into the question of boundary, in order to determine the precise quantity of land which he is entitled to recover. *Doe Dem. Draper's Comp. v. Wilson*, (2 Stark. C.) is clear on that point.

Where the description of the premises in the declaration, is so certain and precise as to show exactly what the plaintiff claims, I should think he might properly be allowed at the trial to take a verdict for any part to which he proves title, and that the verdict might acquit the defendant as to the rest.

In the case before us, if the sheriff should deliver possession to the lessor of the plaintiff, of any thing more than the two or three acres which it was well understood at the trial the defendant has inadvertently defended for, and in regard to which he could not resist the plaintiff's recovery, and never meant to do so, the court would on summary application, restore him to possession, as in *Roe Dem. Saul v. Dawson*, (3 Wils. 49,) so that the defendant is safe

from any fear of losing what he holds, and without a trial. But he desires to avoid the necessity for such an application, as well as the costs of the ejectment, as the plaintiff will no doubt still proceed for the large tract to which he claims title.

We see no objection to granting a new trial upon his application, on payment of costs, with leave to amend the consent rule so as to exclude the small tract in question, paying also the costs of this application.

Per Cur.—Rule absolute.

DITTRICK V. O'CONNOR.

Estoppel, as between grantor and grantee.

The grantee by taking a title from the grantor does not thereby estop himself from denying that his grantor was legally seized.

Hannah Dittrick sued for dower in land in Grantham, as widow of Robert Dittrick.

The tenant pleaded that Robert was not seized at any time during coverture.

The patent issued to Jacob Dittrick, the father of Robert Dittrick for the land in question, and Robert (demandant's husband) was his eldest son.

On the 23rd August, 1828, Jacob Dittrick made his will and devised a certain lot of land to his eldest son Robert, and after his decease to the male heir of his body, devising his other lands to his other sons, James Walter and Jacob, and it was in a part of the other lands so devised to these three sons that dower was claimed.

It appeared that in an instrument executed by Robert Dittrick on the 12th of November, 1828, he recited the will and the entail of the lot devised to him, which incumbrance he said (meaning the entail) he was desirous to remove, and that his brothers Jacob, Walter, and James Dittrick, had also agreed that this should be done; and to that end were willing that the will should be cancelled, which seems accordingly to have been done by some one, so far as the mere act of tearing off the seal and blotting out the testator's name, could do it: the effect of which, if the will could have been thus destroyed, would have been to vest the estate devised to him in fee simple as coming to

him by descent ; and it was part of this arrangement, it seemed, among the brothers, that he should, as heir at law, convey to them the lands which the testator had devised in the will which they imagined they had thus set aside. He bound himself to save them from all claims on his part to any other land of his father.

Then the brother conveyed the particular estate out of which dower was claimed, to his brother Walter, (in order, as it would appear, to carry into effect the arrangement intended by the will); and Walter sold and conveyed to John O'Connor, the tenant in this action.

And the demandant contended that O'Connor, the tenant, having taken a deed from Walter, who received his title from her husband Robert, was thereby estopped from denying Robert's seizure ; and so that she could make good her claim to dower in this land, though, in fact, the will devised the lands away from Robert to his brothers ; and he was never, in fact, seized.

A rule was obtained on leave reserved at the trial, to have a verdict set aside, and a verdict entered for the defendant.

ROBINSON, C. J., delivered the verdict of the court.

We have no doubt that the verdict which was rendered conditionally at the trial for the demandant, must be set aside, and a verdict entered for the tenant pursuant to the leave reserved.

In the first place, nothing, it appears, was said at the trial about the application of the principle of estoppel to this case ; and the jury having all the facts before them, could see that in truth Robert Dittrick never was seized, but that the estate passed from his father to the devisees under the will.

Then, if this were a case for the application of the principle, we should require to see the deed which Walter took from Robert, for it may have been a mere release or quit claim in which no estoppel could be raised ; but we need not suspend our judgment till that is produced ; for I take it to be clear that Walter, by taking a deed from Robert, did not estop himself from denying that he, Robert, was legally

seized ; for if that were so, no grantee in an ordinary deed could ever sustain an action on a covenant for title contained in the deed.

All that can be said is, that Walter by taking a title from Robert, would be held so far to have admitted his title as to make it unnecessary in any action to which he was a party to give proof of Robert's seizin at the time of his making such conveyance ; but that is a very different matter from holding the grantee or his assigns estopped from proving the contrary. Deeds are often taken for the mere purpose of confirmation, and for extinguishment of another's claim, and it would frequently defeat the very object of them, if they should have the effect of disabling the person who took them from showing that he had at the time a better title in himself derived from another source.

What the demandant contends for would lead to this absurdity ; the wife of Walter could not be deprived of her dower in case of her surviving her husband, for he was undoubtedly seized as devisee under the will, which cannot be treated as cancelled : and yet the effect of the alleged estoppel would be to give to the widow of Robert dower in the same land, as devolving upon him as heir, which could not be when there was a valid devise of the same land.

Per Cur.—Rule absolute.

WHITING v. MILLS.

Innkeeper and traveller—when it can be said the relation ceases to exist—as to averment in declaration of the existence of such relation at the time of turning away the traveller from the inn, after verdict.

Where a traveller is shewn to have come to an inn as a guest—to have been so received by the landlord—to have staid there six weeks, and to have paid for his board by the week, two days in advance : Held *per Cur.*, that if dismissed abruptly without cause, he has, under these circumstances, a right of action against his landlord, on the common law relation of innkeeper and guest. To put an end to this relation, the traveller must be shewn to have rented a certain apartment in the inn as tenant for a certain term.

Where the declaration avers that the plaintiff came as a guest and was so received—the intendment after verdict will be that the relation thus begun continued till it was interrupted by the wrongful act of the defendant, nothing being stated to the contrary.

The plaintiff sued the defendant in a special action on the case : the declaration contained two counts.

The first count charged that the defendant was an inn-keeper and kept a common inn at Kingston for the reception and accommodation of travellers; that on the 24th February, 1848, the plaintiff, being a traveller, came with certain goods and chattels, &c., and was then accepted and received by the defendant into the said inn with the said goods as a guest, and that the plaintiff afterwards, to wit, on the 1st April, in the year aforesaid paid to the defendant a large sum of money, viz 10*l.* being for board in the same inn for the space of six weeks ending on the 3d day of April aforesaid. Yet that defendant, not regarding his duty, as such innkeeper, but contriving to injure the plaintiff, and to put her to great and unnecessary trouble, and expense and inconvenience, and to injure her health and feelings, afterwards and upon the said third day of April, did not nor would suffer or permit the plaintiff longer to continue or lodge at the said inn, as aforesaid, with the said goods, during the said time in that behalf, but wholly neglected and refused so to do; and on the contrary thereof, on the night of the said first day of April, in the year aforesaid, then wrongfully and unjustly turned the plaintiff, with the said goods, out of his said inn, whereby the plaintiff was forced to quit the said inn, and to go and travel in the night time of the said 1st April, to the distance of ten miles, in order to procure lodging elsewhere, and a place of safety for her goods.

The defendant pleaded—1. Not guilty. 2. To first count—That the plaintiff was not as a traveller received in the defendant's inn as a guest, as in the first count alleged.

3. To first count—That the plaintiff did not as such traveller as aforesaid pay to the defendant the said sum of money in the said first count mentioned, or any part thereof, as in the said first count alleged: and of this he puts himself upon the country.

On the second count a verdict was given for the defendant; it was therefore out of the question. The jury found for the plaintiff on the first count, and 25*s.* damages; but upon the 3rd plea to that count they found for the defendant.

The plaintiff, by *Henderson*, obtained a rule for judgment

non obstante veredicto upon the the third issue, contending that the plea was no defence—or in the alternative, for a new trial on the ground of misdirection in regard to that issue.

A cross rule was obtained also by *McKenzie* for the defendant, to shew cause why a new trial should not be granted on the law and evidence, or why the judgment should not be arrested on the ground that it was not averred in the first count that the plaintiff was in the inn in the character of a guest at the time of her being turned away; but only that when she came she was received and accepted as such. The authorities cited were—3 B. & Ald. 283; 7 C. & P. 213; 8 M. & W. 372; 11 M. & W., 239; 6 Bing. N. C., 446; 2 M. & W. 495; 8 M. & W. 268; Salk. 338; 12 Mod. 255; 5 T. R. 273; 17 L. J.; C. P. 219; 1 Saund. 312 (c); Poph. 179.

ROBINSON, C. J., delivered the judgment of the court.

In a case where the jury have given such small damages, it would be unfortunate if a necessity were forced for continuing a litigation which is not likely to be of service to either party.

1st. As to the defendant's application for a new trial in case the 3rd issue on which he succeeded, should not be held to be a good bar to plaintiff's action—we see no sufficient ground on which we could grant it. It was proved that the plaintiff came to his inn as a traveller or guest, and was received as such. If she did pay by the week as was alleged, and if she was charged for board by that name, that would not certainly show that she was there under any special contract inconsistent with the common law relation between an innkeeper and his guest. She had been there about six weeks. If she had rented a certain apartment as tenant for any certain term, she would have been no longer a guest; but what is shewn is that she came to the inn as a guest; that she was so received, staid there six weeks, and had paid for her board by the week two days in advance.

Under these facts, we think the defendant, for all that appears, had his privilege of lien on the plaintiff's goods,

if she had attempted to depart without paying; and that she, on the other hand, had her rights as a guest, and could not be rudely or abruptly turned out without some cause to justify it; and no such cause was shewn, nor was any pleaded.

If the relation of guest had, before the occasion complained of, been put an end to, we can only say that it was not proved to be so upon the trial.

Then, 2ndly, as to arresting judgment: the declaration seems to have been taken from a form in the case of *Fell v. Knight*, 8 M & W 269. It states that the plaintiff came as a guest, and was so received: and the fair intendment, after verdict is, that the relation thus established, continued till it was interrupted by the alleged wrongful act of the defendant, nothing being stated to the contrary. The mere paying two days in advance would not make her anything but a guest: she might have good reason for doing so, or might have assented, merely because she was so charged. The landlord may, for all we know, have usually charged his guests by the week, when they staid over a week. Then, as it is averred in the declaration that the plaintiff was received as a guest and paid her bill, and was nevertheless turned away against her will, without anything being stated in the declaration from which we can see that she had not continued in the defendant's inn as a guest up to that day, and as the act is charged to have been contrary to the defendant's duty as an innkeeper, we think a good *prima facie* case is stated on the record, and, as I have already stated, no justification for turning the plaintiff away was proved or pleaded.

Then, 3rdly, as to plaintiff's motion for judgment *non obstante veredicto*, upon the third issue: We think we must look upon the third plea as admitting what is not directly traversed in it—namely, that the plaintiff was in the defendant's inn as a guest, and as being intended to deny only the allegation of payment of her fare, which was a fact necessary to be proved in order to sustain the plaintiff's case, and a fact expressly averred in the declaration. The plaintiff rested her case, not on any allegation of tender, but on an aver-

ment of actual payment. The 3rd plea traversed the payment and did not the less traverse it because it added that she did "*not as such traveller pay*," &c. If a party sued as executor were to plead payment, and the plaintiff were to reply, that he did not as such executor pay, we should treat that, not as a traverse of the executor's tender, but of the payment. So we think that the said plea traversed a material fact, and it has been found for defendant. We think such finding was not in accordance with the evidence; but the matter in dispute is trifling, and it is stated, and also the fact is so, that in the argument of the rule the plaintiff's counsel declared that he abandoned any application for a new trial, on that issue upon the evidence.

The rule therefore for judgment *non obstante* is discharged.

THE GORE BANK V. CHASE.

The right of a party having leave to amend his replication to file a special demurrer in lieu thereof.

Where a party who had obtained leave to amend his replication, filed a special demurrer in its stead—and a judge in chambers set the demurrer aside: Held *per Cur.*, upon an application to rescind the judge's order, that the judge had properly decided.

Mr. M. Vankoughnet moved for a rule nisi to rescind an order of Mr. Justice McLean in chambers, setting aside a special demurrer.

The plaintiffs had replied to the defendant's plea, and having applied for and obtained a judge's order allowing them to amend their replication, they filed a special demurrer instead of their replication, and contended that as that special demurrer contained some exceptions which would be equally good on general demurrer, and as a special demurrer might be filed by a party who was under terms to plead specially, it was therefore competent to the plaintiffs to amend their pleading, by substituting what was in effect a general demurrer, for the replication which they obtained leave to amend.

Mr. Justice McLean considered that they had exceeded the permission granted to them, and upon the defendant's application he set aside the special demurrer.

ROBINSON, C. J., delivered the judgment of the court.

We think the learned judge was quite right in doing so. Amending a replication, which is what the plaintiff has leave to do, is a very different thing from withdrawing it and filing a special demurrer in its stead. The court or judge may think it right to grant leave to do the one, when, under the circumstances, they would not think it right to do the other; and besides, it is always a matter of discretion upon what terms the amendment asked for shall be allowed, and these will vary according to the nature of the amendment.

Per Cur.—Rule refused.

KNOWLSON V. CONGER, SHERIFF.

New trial—Trover—Smallness of damages—Costs.

Where, in an action of trover, the court thought the jury should have treated the transaction as being, on the plaintiff's own shewing, *ipso facto* fraudulent, they granted a new trial, though the verdict was only for 11*l.* 10*s.*, with costs to abide the event.

Trover for goods.

Pleas—Not guilty; plaintiff not possessed; goods not plaintiff's property.

Verdict for plaintiff—11*l.* 10*s.*

The defendant obtained a rule for a new trial, on the evidence: the only question was as to the discretion the court might see fit to exercise, under the facts as given below, in granting a new trial, and upon what terms as to costs.

ROBINSON, C. J., delivered the judgment of the court.

Although the verdict is for a small amount, yet we feel that we cannot refuse a new trial; for this is not one of those cases in which, the evidence being conflicting, the jury have determined in favour of that party who has seemed to the court not to have the weight of the testimony in his favour.

The jury were told in this case, and, as we think, most properly, that the whole testimony shewed the assignment on which the plaintiff relied for defeating the claim of the execution creditor to be a mere pretended assignment, and clearly fraudulent on the face of it.

I cannot conceive how the jury could have thought it right to uphold it, taking the transaction to be just such even as the plaintiff's evidence describes it. In so small a matter, we might not perhaps have interposed, if the jury, for some

reason unknown to us, had discarded altogether the testimony of the two witnesses, and if the assignment, without their evidence to impeach it, would have appeared to be such as ought to be sanctioned in a court of justice.

But here there was a debtor anxious to avoid paying a particular creditor, and to save his goods from execution; and he thinks he has done what is sufficient for this purpose by riding a few miles to a neighbour, and signing there a bill of sale of his effects, grain, &c., which are never afterwards removed from his own premises. He goes through this form, which is seldom done except where a fraud is intended, of delivering possession of the horse on which he had ridden over, in the name of the whole; but immediately after he mounts this horse and rides him home again: the assignee gives himself no trouble about that, or anything else contained in the bill of sale, but allows this plaintiff to sell his wheat, or as much of it as he pleases, and to continue to consume what he required in his family, and no charge of any kind is made in the care, use or disposition of the property, nor any other apparent object in taking the assignment, except to defeat a creditor in getting payment of his debt.

The jury should have treated the transaction as being, on the plaintiff's own shewing, *ipso facto* fraudulent. To afford relief only on the condition of paying costs, would be no relief in such a case.

Per Cur.—New trial; costs to abide the event.

PROUDFOOT, AS TRUSTEE OF THE HOME DISTRICT SAVINGS BANK, v. MURRAY.

When a solicitor can be said to be the agent of the plaintiff in the receipt of monies paid by the defendant, so as to discharge defendant.

Held, per Cur.—That, under the circumstances of this case (as given in the statement and judgment below), the solicitor could not be considered the agent of the plaintiff, so as to make a payment to him (the solicitor), from the defendant, a payment to the plaintiff.

Debt on bond on 1000*l*.

Bond and condition set out in oyer.

The bond was dated the 6th October, 1845, and was given by the defendant Murray and W. H. Boulton, as a joint and several bond in 1000*l*. penalty, to William Proudfoot, Esq., as trustee of the Home District Savings Bank.

In the condition it was recited that Murray had borrowed from the said Home District Savings Bank 500*l.*, and that the said W. H. Boulton had agreed to become personally bound for the same; and the condition was, that if the said Murray, his heirs, &c., should pay to the said W. Proudfoot, as such trustee aforesaid, his executors, &c., the sum of 500*l.* on or before the 1st of January 1848, and should pay interest thereon after the rate of 6 per cent., or such increased rate as might thereafter by law be established, by equal half yearly payments, *on the first day of October and April* in every year, then the bond should be void; but if default should be made in payment of the interest of the said 500*l.* or any part thereof, on the day when the half yearly payment of such interest should become due according to the stipulation aforesaid, then the whole sum of 500*l.* and interest was to become immediately payable to the said trustee.

And the defendant pleaded that he did, on the days and times in the said condition mentioned, pay the plaintiff the interest on the said 500*l.*, and did on the 1st January 1848, pay him the 500*l.* according to the condition of the bond: on which plaintiff joined issue.

It was proved, that on the occasion of this loan being made, the defendant Murray and his wife executed an instrument under seal, to the effect that in consideration of 500*l.* paid to them by the plaintiff, trustee of the Home District Savings Bank, they granted, bargained, sold, assigned, transferred and set over unto the said William Proudfoot, as such trustee as aforesaid, all such sum or sums of money as then were or thereafter should grow due unto them from certain monies belonging to the said Mary Anne Murray, and invested under her marriage settlement, and payable through the hands of Clarke Gamble of Toronto, Esq., until the said sum of 500*l.* should be fully paid back to the said Home District Savings Bank, with interest. And this instrument further declared, “We do hereby *request and require the said Clarke Gamble or the acting trustee under the said marriage settlement* for the time being, *to pay over to the said Savings Bank the said interest grow-*

ing due as aforesaid, at such time and in such amount as *may be required by the said Savings Bank*; and we do hereby declare *that the receipt or receipts of the manager, trustee or director of the said Home District Savings Bank shall be a sufficient release or discharge to our trustees for such payment or payments.*"

Upon the trial, Mr. Gamble was examined as a witness, and swore that he was, for some years before and at the time of this transaction, one of Mr. Murray's trustees under his marriage settlement; that he was one of the directors of the Savings Bank in 1845, and was solicitor to the Savings Bank and also solicitor of the plaintiff; that the Savings Bank was not a chartered body, but the monies deposited in the bank were invested in loans by order of the directors, upon securities taken in the name of this plaintiff as trustee; but being requested by the defendant to obtain a loan for him, an application was made to the board, as was usual, on which occasion he, Mr. Gamble, represented to the board that the defendant had a yearly income passing through witness's hands as his trustee, or rather through the hands of Messrs. Gamble and Boulton; and that they could stop the instalments out of the income, and pay them over.

He stated further, that monies had been annually charged against defendant in the books of Gamble and Boulton in their accounts rendered to the defendant, as having been paid by them to the Savings Bank; and that he, Mr. Gamble, was himself under the full impression that such sums had been paid over to the actuary of the Savings Bank, and did not know the contrary until the failure of Messrs. Gamble and Boulton, which occurred in February 1848. He swore that he knew nothing of the accounts; that he had no loans of the Savings Bank to receive, and no authority from the bank to receive money for them, and was not their agent; that he was instructed to take the security, but no instructions were at the time given to the book-keeper; that he was never applied to for the interest of the loan; that the affairs of the bank were laid before the directors when they met; that he did not take the assignment of the trust money as an authority to receive the money on

behalf of the bank, but as authority to himself to retain the money; that the money had not been in fact paid over by Messrs. Gamble and Boulton; that he told the bank that he had the defendant's consent to retain 125*l.* yearly to be employed in liquidation of the loan; and that he thought the loan could not have been effected without that; that he never got any receipts or paid over any money on account of this loan; that the Savings Bank had an office with an actuary or manager.

The late book-keeper of Messrs. Gamble and Boulton produced their books containing entries of sums as paid by them to the Savings Bank. He also swore that Mr. Gamble transacted business for the plaintiff in other matters; that the money was never in fact paid to the Savings Bank; and that he did not think that Mr. Gamble knew anything about it.

No evidence was given for the defence.

The learned judge told the jury that except for one circumstance in the case, he had no doubt that Messrs. Gamble and Boulton must be regarded as the agents of the defendant Mr. Murray, to detain and pay over the money to the Savings Bank—not the agent of the Savings Bank to receive it for them. Any doubt that he felt was from the fact of the assignment of the income under the marriage settlement being made to this plaintiff, which was more than a mere authority to another to retain for him, and which gave ground for insisting that the money when received by Messrs. Gamble and Boulton was in their hands the money of the plaintiff, and their receipt his receipt. On the other hand, there was the provision in the assignment that Messrs. Gamble and Boulton should take the receipts of this plaintiff; and the whole facts of the case, he thought, shewed them to be Mr. Murray's agents; that Mr. Boulton being himself one of the obligors in the bond, it would seem repugnant that a receipt of money by him should be a discharge of his own obligation. He thought there was no pretence for holding that Gamble, as a director of the Savings Bank, had received the money.

The jury found for plaintiff 622*l.* 10*s.*

Cameron, Q. C., obtained a rule for a new trial on the law and evidence, and for misdirection. *Hagarty* shewed cause. The authorities cited were—6 Beaven, 565; 11 Jurist, 935; 7 Beaven, 506; Dougl. 623; 1 Campb. 111; 1 New Rep. 102; 1 Esp. C. 115; 14 Ea. R. 473; 1 T. R. 62; 2 Campb. 123; 1 Salk. 289; 2 Esp. 510; 1 Salk. 157; Story on Agency, secs. 98, 104.

ROBINSON, C. J., delivered the judgment of the court.

This case has been argued on the part of the defendant, and though it has not yet been spoken to on the part of the plaintiffs, we need not delay giving our judgment; for we cannot, in any view which we can take of other evidence, bring ourselves to doubt that the verdict which has been given must stand.

It appears to be a very hard case for the defendant, but the misfortune is that the fund which should have gone to pay his debt has been so disposed of that a heavy loss must fall either upon the borrower or the lender, and each is entitled to claim for his protection the full benefit of every consideration which can shew him to be fairly exempt.

It would be so in the case of individual suitors on both sides; and here the plaintiff represents a charitable institution which has made an investment of a part of its funds which are involved in this action; and the question is whether the Savings Bank is legally liable to lose those funds, which they must do if it were our duty to hold that the sum in question of 600*l.* and upwards is to be regarded as repaid to them, when it has in fact never found its way into their hands.

The only ground on which it appeared to the learned judge at the trial that there could be any room for hesitation, was the fact that the defendant and his wife had, by their written assignment, transferred and made over to Mr. Proudfoot, as trustee for the Savings Bank, all such monies as were to accrue due under their marriage settlement, and to be payable to them through the hands of their trustee or agent, Mr. Gamble. But it cannot be maintained that in consequence of that transfer, the monies accruing under the settlement became at once, upon their receipt by Mr.

Gamble, the monies of the plaintiff Mr. Proudfoot, as trustee for the Savings Bank. That assignment could do no more than give to the plaintiff a right to claim the money; it could not give him the money before it came into his possession, by the mere legal effect of the assignment; for if it could, then the plaintiff might have been regarded as being paid his debt, by the money getting into the hands of Mr. Murray himself, as well as by its getting into the hands of his trustee.

The direction in the instrument, that Mr. Gamble shall, as the trustee of the defendant and his wife, pay over the monies which he shall receive for them to the plaintiff for the Savings Bank, and that the receipt of the managing director of the Savings Bank shall acquit the trustee of such payment, shews clearly that it could not have been contemplated by the parties that Mr. Gamble was the agent for both parties, or the agent of Mr. Proudfoot or the Savings Bank, so that his bare receipt of the money should at once discharge Mr. Murray of the debt, whether he ever paid it over or not.

The debt was not to be paid till 1848, according to the bond, but only the interest half yearly; though there seems to have been a verbal understanding that Mr. Gamble might retain a certain sum annually to go towards liquidating the principal. It is impossible to hold that the defendant's trust monies getting into the hands of his own trustee, constituted, *ipso facto*, a payment to his creditor of a debt which was not at the time due. This is only an additional circumstance in the case, which would be equally clear against the defendant without it. And the same may be said of another circumstance noticed at the trial, that Mr. Gamble, being a partner of Mr. Boulton's, and the defendant's trust monies being proved to be in fact paid into the hands of Messrs. Gamble and Boulton, who collected his rents and dividends,—what is contended for by the defendant would have the effect of discharging Mr. Boulton, who is a co-obligor with Mr. Murray to the plaintiff, by a payment made, not by himself but to himself.

The broad ground however is, that the money only passed

into those hands into which it would equally have gone if there had been no transaction with the Savings Bank ; and that while in those hands it was still the defendant's money, in the hands of his own trustee, whom he had authorized to pay it over, but who never did in fact pay it over.

It was not shewn that the plaintiff was in any manner instrumental in the money getting into Mr. Gamble's hands : he had neither, as appears, deposited the bond with him, nor instructed nor employed him to collect the money, nor authorised him for any purpose to receive it, nor had been made aware that he had received it.

No sum that we could say was intended for the plaintiff came into Mr. Gamble's hands as distinct from the other trust monies, or was ever separated from the rest with any view to such a payment. If the debt had been due by defendant on his promissory note given more than six years ago, and the plaintiff were seeking to relieve himself from the Statute of Limitations by shewing a payment of interest to himself on account of the note within six years, it could surely never be held that he had established such payment by shewing that Mr. Gamble had, as trustee, received monies under the marriage settlement for the defendant, though he had made no payment to the plaintiff, nor ever apprised him of having money in his hands, and though he had not been made by the plaintiff his attorney for collecting the debt.

If the case be taken on the ground of Mr. Gamble's having authority from the plaintiff to receive this money for the Savings Bank, either as his attorney in this particular case or as his general agent, it clearly fails ; for the evidence given on the trial negatives either, and amounts only to this : that Mr. and Mrs. Murray had, by way of security, agreed to make over the debts, rents and dividends due to them by third parties, to the plaintiff, which could not work a legal transfer of those undefined choses in action ;—in other words, they gave a written authority to their trustee to apply these monies in making the contemplated payment, which it was right they should do, because in negotiating the loan he had held out these accruing rents, &c., as being certain to furnish the means of payment.

That was the whole object of the instrument; and if it were to be held that it had the legal effect of making the trust monies as soon as they got into Mr. Gamble's hands the monies of the plaintiff, so that if they were lost or misapplied, the debt would be nevertheless paid, then the plaintiff would be much worse off from having taken an instrument which was intended to fortify his interest.

If the bond to the plaintiff had been left in Mr. Gamble's hands, of which there seems to have been no evidence, there are cases which would seem to warrant the inferring from that an authority to him to receive the money; but how far the principle would apply in a case like the present, when the money was not paid to him as being in possession of the bond, with any view to this particular debt, but was merely received by him in another capacity, and from persons having no privity with this debt, would require to be considered.

The issue here is upon the defendant's plea, that he did on the days and times mentioned in the condition of the bond, pay to the plaintiff the interest on the bond, and did on the 1st January 1848, pay him the 500*l*. And the evidence upon the trial wholly failed, I think, to prove this plea, but clearly proved that the plaintiff was never paid.

If we could have held that the evidence shewed Mr. Gamble to be the agent of the plaintiff to collect or receive this debt, as well as the defendant's trustee to receive his rents and dividends, then perhaps the fact that in the accounts rendered by Mr. Gamble to the defendant charges were made against the defendant of sums paid by Mr. Gamble to the Savings Bank on account of this debt, might be held to shew an appropriation binding on the plaintiff as well as on the defendant: but we do not see any evidence on which Mr. Gamble could be held to have been constituted the plaintiff's agent for receiving payment of this debt.

Per Cur.—Rule discharged.

BELFORD V. HAYNES.

What constitutes a dedication of land to the public.

A dedication of land to public use takes effect from the *intention* of the person making it; and the merely opening or widening a street for the convenience or benefit of the person doing it, and permitting the public to use it, will not constitute a dedication. The question of dedication or no dedication must now be left as a question of fact for the jury.

Action on the case for obstructing "a certain public highway in, through, over and along a certain close situate and being in the town of St. Catharines, in the District of Niagara, commonly called Ontario-street, by erecting and placing a wooden building on the said highway, whereby plaintiff was prevented from passing along the same with his team," &c.

Plea—that the wooden building mentioned in the declaration was not, nor was any part thereof, at the said time when, &c., upon the said public highway, or obstructing the same, in manner and form, &c.

The case was tried before the Chief Justice at the last assizes at Niagara. It appeared to be conducted as an amicable suit brought to try whether the defendant had or had not acted wrongfully in placing his house where he did, and no objection was taken or question raised as to the right of the plaintiff to bring a private action for what would be a public wrong, and properly punishable only by indictment at the instance of the crown,—unless the plaintiff could shew, what he did not appear to the Chief Justice to do, that he had sustained any special and particular injury from the nuisance.

The parties went at once and without reserve into the question of legal right in the defendant, and after hearing the evidence, the jury found a verdict for the defendant upon the recommendation of the court, subject to leave reserved to move to enter a verdict for the plaintiff, if the court should be of opinion that he was entitled to recover.

The point to be determined may be made sufficiently clear by a short statement. The defendant, and those whose title he holds, have been in possession for more than forty years of some acres of land in the township of Grantham, which now form a part of the town of St. Catharines.

The tract composes part of one of the farm lots in Grantham, having its front to the south, on the public road leading from Niagara to Hamilton. Along the west side of the lot there is a highway leading from Lake Ontario to St. Catharines, which intersects the Hamilton road at right angles at the south-west corner of the defendant's tract. About forty years ago, the only house upon this tract was Shipman's Tavern, a wooden house which has been occupied as an inn ever since. This house was originally placed some yards back from the Hamilton road, and was built with its front not ranging parallel with that road, but having its right or western end thrown back, so as to make the building front towards the south-west corner of the tract, and leaving a vacant space not only in front of the house and between it and the Hamilton road, but around the end of the house which looked towards the lake road. This space has been always allowed to be unenclosed, the proprietor nevertheless having the south-west angle of his tract, about which there was no dispute, always distinctly marked by a monument. For many years, from 1808 downwards, the house was a mere country inn, but now the tract forms nearly the circle of the town of St. Catharines. The line of road betwixt Niagara and Hamilton, where it passes along the front of the tract, is now called St. Paul's street; the road running down to the lake is called Ontario street. The space which Shipman left unenclosed along the front and about the west end of his house, has always lain open to the public, like other such vacant spaces contiguous to the highway, where the proprietors have chosen to build a little back from the boundary; and from an early period, as would usually take place under such circumstances, people passing with their waggons backwards and forwards between the Niagara road and the lake road, instead of continuing along either road till they came to the point of intersection at Shipman's corner, would shorten the distance by turning out of the road they were travelling before they came to that point, and crossing the open space close around the west end of the inn; but there was still the regular line of road open and in use, which would

generally be taken by those who were neither intending to stop at the inn or to go to any point east of it.

St. Paul street is now the principal street of St. Catharines, and the Board of Police having made regulations prohibiting the putting up any more wooden houses upon it, the defendant, who now owns that tract in question, in May 1849 wrote to the board, stating that he wished to move round and straighten the old Shipman's tavern so as to place it on the line, and to improve the external appearance of the building; and he begged to ask whether the board had any objections to his doing so. No objection was made, and the defendant moved the house round so as to make the front range with the other houses on St. Paul street; and by thus laying the west end at right angles to that street, the building was made to cover a small space of ground which had before for a great many years been travelled over by the public in taking the short cut which it was usual to take around the corner of the inn: he added also a small piece to the west end of the house.

The corporation complained that the defendant had, by encroaching upon these few feet of land with his building, done more than they had given him permission to do: they contended that by asking their consent he had admitted that he had not a right to encroach upon any part of the land which had so long been left open to the public; and they intended that the use which had so long been allowed to be made of the open space amounted to a dedication of it as a highway; and they gave some proof that statute labor, or the funds of the corporation, had occasionally been applied of late years in mending and repairing, as part of the highway, the same small piece of land which the defendant had lately covered with his building.

The defendant on his part denied that any dedication of the vacant land as a highway was to be implied from the facts of the case. He gave evidence to disprove the alleged fact of public labor or money having been applied in repairing the piece of land now in question as a highway, and he alleged that his application to the corporation had referred to their own order that none but brick or stone

buildings should be put up in St. Paul street, and that he was in doubt whether his giving a new wooden front to the old building in the manner he proposed, would be deemed an infraction of the by-law.

Cameron, Q. C., obtained a rule to shew cause why a verdict should not be returned for the plaintiff. *Vankoughnet*, with whom was *Wm. Eccles*, shewed cause. The authorities cited were—11 M. & W. 828; 5 C. & P. 460; note to 1 Smith's L. C. 193; 5 B. & Al. 454, 11 Ea. R. 375 note; 5 Taunt. 142; 1 Campb. 263; 4 B. & Al. 447; 1 Mg. & Gr. 392; 8 A. & E. 106, 847; 3 Bing. 447; 4 B. & C. 591; 17 L. J. Q. B. 177.

ROBINSON, C. J., delivered the judgment of the court.

The case was tried before me. I did not think much of the alleged small repairs done to the road in that part which the building now covered, because the evidence was contradictory on that point, and it was something inconsiderable at all events, and could not be conclusive as to the right, since for convenience or ornament the authorities of a town might choose to apply a little labour or money on a piece of land situated as it was, so long as the proprietor chose to let it remain open without their imagining that they could thereby deprive him of his property; and the owner could not be expected to object, since it would not interfere with his convenience.

Then, as to the acknowledgment of right endeavoured to be drawn from the permission which the defendant had applied for: that again could not be a conclusive circumstance, especially explained as it was; and whether that explanation was satisfactory or not, still, if the defendant had a doubt as to his right to occupy the few feet of ground which had been so long left open to the public, it was natural and commendable that he should first communicate with the council rather than act rudely on his own impression of his rights. At any rate, he could not absolutely lose his right by asking whether the corporation would make any objection; and after all, the issue which the jury were to try upon their oaths, was whether the *locus in quo* was or was not, at the time of the alleged obstruction, part of a public

highway. That was the question to be tried, and I left it to the jury upon the evidence to say, whether the defendant and those under whom he claimed had allowed people to use the land in question, intending to dedicate it to the public as a highway,—or whether they had merely for their own taste or convenience, or the convenience of those who resorted to the inn, left open and unenclosed the space around the house, contiguous to the highway, and within the acknowledged boundaries of their property.

The jury found that it was not with the intention of dedicating the land to the public as a highway that it had been allowed to be open, but that the land being contiguous to the highway, the proprietors had merely forborne to enclose it for the convenience of themselves and of those who resorted to their inn.

We think that it was proper so to submit the case to the jury, and that the verdict was not inconsistent with the facts proved, and should therefore be allowed to stand.

The proprietor in this case had laid out no road to lead through his property from one public thoroughfare to another, which was before unconnected by any travelled highway. All that could be said was that Mr. Shipman, coming to the place at a time when little was thought of a few yards of ground, had built his house, as is very usual, some distance back from the road, and had not thought it worth his while to enclose the vacant space, finding it no doubt more for his convenience to leave it an open space in front and about his door. There was already a highway on both sides of him: a road was not wanted in order to enable the public to pass from one point to another; and there is no reasonable foundation in such a case for presuming an intention to dedicate the ground as a highway, because the public had already a highway there to which this open space was contiguous. It is difficult to lay down any rule that should be inflexibly applied in such cases; and it would be unsafe and embarrassing to attempt it. Each case must depend on its own circumstances; and it must commonly be a question for the jury with what intention the user has been permitted. It would never do

to hold it for a general rule, that where the owner of land lets a space lie open between his house and the highway for a number of years, he must be taken to have intended to add that to the highway which has an ample width already secured to it by statute—making the road, without necessity, or without any rational object of convenience to the public generally, so much wider in that point than it is in others.

A man is under no legal necessity to enclose all his land: the law encloses it with an invisible boundary; and while he resides upon any part of it, he is at the same time equally in possession of the whole—it not being necessary to the continuance of his right of property that he should exclude the public from space which he leaves open for his own convenience; and this the public will always more or less take advantage of in order to move about more freely, where it lies contiguous to the highway, and where they can save a few yards travelling by cutting across a corner of his open ground, rather than following the regular public highway to the proper point for turning. They will generally take the liberty of doing so, but it would be unreasonable to hold that this kind of liberty, under ordinary circumstances, after any lapse of time, turns into a right, so that the proprietor can never resume possession of his property and leave the public to enjoy the legal highway according to its proper limits. In the case of lots in a town left for some years unenclosed, such a doctrine would create great hardship. Nothing is more common than for persons, especially in the country, to build at a small distance from the road, leaving the retiring space open. So, in many parts of the province where proprietors have their lands extending down to the lake or river, it is not uncommon for them to build on the further side of a road leading along the bank, leaving their land vacant between the highway and the bank where the area is small. In all such cases, travellers, so long as the ground lies open, may divide if they please from the common track, and go over any point of the vacant space; but I have never observed that the right of the party to enclose his land, after

any lapse of time, has been questioned, so long as he leaves to the public allowance for road its full width.

What is contended for by the plaintiff in this case, would, if it were conceded, impose upon all persons the necessity of building on the very limit of their lands; for otherwise, however desirable it might become for them afterwards to occupy all that they owned, they would have lost their right to do so; and when a proprietor's lands bordered on the highway, it would not be safe for him to make any temporary sacrifice for comfort, or convenience, or for ornament. If he should leave it open where it lay immediately adjacent to the highway, the public would be sure to take the liberty of passing over it whether he liked it or not, and more especially if it afforded the means of a short cut around a corner, as in the present case. The proprietor therefore, when his land is so situate, in order to save his property, would be compelled to enclose it up to the house, although by thus shutting out the public from access to his house he might subject himself to great present inconvenience.

The spirit of the English decisions is in favor of the view which we take of this point; and it is in accordance with them that it has been held expressly in several cases in the American courts, that "a dedication to a public use takes effect from the intention of the person making it, and that the merely opening or widening a street for the convenience or benefit of the person doing it, and permitting the public to use, will not constitute a dedication."

This is stated in a note to the case of *Poole v. Huskisson*, in the American edition of *Meeson & Welsby's Reports*, vol. 2, 828; which case itself fully supports the principle, that under such circumstances as I have stated, the question of dedication or no dedication is now to be left to the jury.

We must be understood, however, as not sanctioning by our judgment any further change of the plaintiff's possession than has actually been made, and which formed the foundation of the question in this cause; for the evidence would have to be carefully considered in regard to its application and effect upon any particular portion of the land,

taken in connection with what has been done by public authority respecting the several streets, and the manner and spirit in which that has been submitted to.

Per Cur.—Rule discharged.

BROCK DISTRICT COUNCIL V. BOWEN, DANIELS & ROWNDS.

Bond—variance in setting it out—The effect of not setting out the condition of a bond, but treating it merely as a common money bond on a plea of non est factum—The effect of taking a verdict for the penalty, and not suggesting breaches on the record, where the bond comes within the statute.

The plaintiffs, by the name of the "Council of the District of Brock," declared in debt on bond. The declaration stated that the defendants acknowledged themselves to be held and firmly bound to the said plaintiffs; the bond, when produced at the trial, was found to be given "to the Municipal Council of the Brock District." The bond was not set out on oyer. *Held per Cur.*, that this variance was not fatal.

The plaintiffs—who had taken from the defendants a bond for the due performance of a collector of rates' duty, with a condition in the form prescribed by certain municipal by-laws—declared upon this bond as upon a common money bond, without setting out the condition. The defendants pleaded *non est factum*. *Held per Cur.*, that upon this plea, the condition being only a defeazance and not part of the bond, the bond, as set out without the condition, was a valid bond; that there was no fatal variance, and that the plaintiffs were entitled to recover. It would have been better however for the plaintiffs to have set out the condition in their declaration, and to have assigned breaches.

In debt on bond—to take a verdict for the penalty, where breaches have not been suggested or assigned in the replication, and the bond comes clearly under the statute 8 & 9 Wm. III. is irregular, and the verdict may be set aside.

Semble—that the breaches may be suggested even after verdict, and then the plaintiff may go down again before a jury and assess his damages.

The plaintiffs, by the name of "The Council of the District of Brock," brought this action against the three defendants, on a bond dated 30th October 1848, in the penalty of 300*l*. The declaration stated that they acknowledged themselves to be held and firmly bound to the said plaintiffs. The condition was not set out.

The defendants pleaded—

1. *Non est factum*.

3. That the bond was made by Bowen as collector of rates for the township of Burford in the District of Brock, and by the other defendants as sureties, under the provisions of an act of the parliament of Upper Canada, passed in the second year of Queen Victoria, entitled "An Act to alter and amend sundry acts regulating the appointments and duties of township officers;" and that it was not in the

form or such as was required by that statute, there being no condition as prescribed by the statute.

3. That the bond was made by the defendants for the purpose stated in the last plea, and that on the 3rd January 1849, the treasurer of the district laid before the quarter sessions, according to law, a list of collectors' rates in arrear for the year 1848, and returned Bowen as being in arrear for that year, and that a warrant was thereupon issued to the sheriff to distrain, and the sheriff did distrain the goods and chattels of the defendants to the full amount of the rates in arrear, with costs.

4. That the bond was obtained by fraud, covin and misrepresentation.

The plaintiffs replied to the 2nd and 3rd pleas, that the bond was not made by the defendants under and by virtue of the provisions of the statute in those pleas mentioned—and to the 4th plea traversing the fraud.

The plaintiffs suggested no breaches, and there was no condition set out on the record.

Upon the trial, the plaintiffs proved a bond made by the defendant Bowen, "collector of rates for the township of Burford," and by the other two defendants, whereby they bound themselves in 300*l*. "*to the municipal council of the Brock District,*" with a condition underwritten, that if Bowen shall collect all rates and assessments authorised and required to be raised, levied and collected, under the authority of any by-law of the municipal council of the Brock District, for the support and maintenance of common schools or for the purchase of school sites, or for the erection and repairs of school houses, or for any other purpose not otherwise provided for by law, within the township for which he has been appointed collector, and shall pay all monies he shall so collect to the several parties authorised by law to receive the same, the payment of which is not otherwise provided for by law, or by by-law of the municipal council of the Brock District, except his own percentage, on or before the third Monday in December, in the year 1848, then this obligation shall be void," &c.

A by-law was shewn and proved on the trial, which,

reciting the 39th clause of the 4 & 5 Vic. ch. 10, and 10th clause of the 9th Vic. ch. 20, provides, that before the collector received his rate roll from the clerk of the peace he should deliver to him a bond, of which the form, with condition, is given in the by-law—to be signed by two freeholders as securities.

The bond sued on in this case exactly followed the form given in the by-laws as to the condition.

The defendant's counsel objected at the trial, that the bond produced was not made to "*The Council of the District of Brock*," as stated in the declaration, but to the municipal council of the Brock District.

2. That the condition of the bond should have been set out.

3. That breaches should have been suggested.

4. That the district council had no power to take such a bond.

5. That the bond could only be taken under the statute 1 Vic. ch. 31, and that the district council had no authority to alter the form or manner of security.

These objections were overruled, reserving leave to the defendants to move upon them in *banc*. No evidence was given of monies in arrear. The jury were directed to give a verdict for the debt 300*l.*, and 1*s.* damages.

At the same assizes another case was tried between the same parties. In that action the plaintiffs, *by the same corporate name* as in the other, sued the defendants on a bond made on the 29th September 1847, in a sum of 600*l.*, setting out no condition.

The defendants pleaded only *non est factum*. In this case also, the condition of the bond was in no manner set out upon the record; nor any breach suggested or proved.

A bond was produced exactly similar to the other in form, only being for a different year and in a different sum.

A verdict was taken for 600*l.*, subject to the same exceptions.

The defendants, by *Hawke*, obtained a rule to have a verdict entered for them, or for a new trial on the law and evidence. *Read* shewed cause. The authorities cited

were—2 Saund. 187 (a); 8 T. R. 255; 5 M. & S. 60; 8 M. & W. 65, 645; 10 Co. 124; 11 Co. 19; 1 B. & Bing. 442; 4 T. R. 669; 2 Stark. C. 29; 2 Campb. 548; 2 M & S. 282; 1 B. & Al. 699; Cro. Eliz. 816; Leach C. C. 1005, 619; 11 Mod. 275; 5 Taunt. 707; Salk. 659; 4 Moore 66; 1 T. R. 232; 3 Taunt. 504; 1 B. & P. 443; 2 Campb. 274; 9 Ea. R. 160; 1 Vic. ch. 21, secs. 17, 18; 4 & 5 Vic. ch. 10, secs. 39, 57; 9 Vic. ch. 20, secs. 8, 27; 1 U. C. R. (O. S.) 403.

ROBINSON, C. J., delivered the judgment of the court.

With regard to the first objection taken at the trial, whatever might have been the case if the bond had been set out on oyer, I think the variance in the name of the corporation is not such as we should hold fatal.

The plaintiffs sue by their right name, given by the stat. 4 & 5 Vic. ch. 10—that is, “The Council of the District of Brock,” and they sue upon a bond which they say was given to them, the plaintiffs; if they had added by the name of &c., and then stated the corporate name inaccurately given in the bond, they would have stated the bond as it was, and would only have left room for the question, whether the bond was void or not for want of a sufficient designation. As to that point I think there is no reason to doubt that we are warranted by abundant authority in holding the bond good (a). The bond is to “The *Municipal* Council of the Brock District.”

It is strange that the public officer who took the bond should not have used the exact name given to the corporation by the statute; but we cannot hold that the variance is so great as to make the bond void. The stat. 4 & 5 Vic. ch. 10, calls these councils municipal authorities; and though it has dropped the word “municipal,” in the corporate name, yet they are in fact municipal bodies, and are so called in the title of this statute. Then, I think, though I have had some doubt on that point, that the bond not having been set out on the record on oyer, the plaintiffs are not bound to the same literal or even verbal exactness, but

(a) 10 Co 124; 11 Co. 19; Hob. 125; Leach, C. C. 1005-6; 2 Campb. 548, 273, note; Str. 831; 5 Taunt. 709; 9 Ea. R. 160; Willes v. Barrett, 2 Stark. C. 29.

are safe if they make the identity certain, and preserve clearly the legal effect in the statement. If we must hold, as I think we must, that "The Council of the District of Brock" is the same thing in effect as "The Municipal Council of the Brock District," then the plaintiffs have said truly that the defendants have made their bond to them, *the plaintiffs*, which is all that is asserted.

In *Pitts v. James* (Hob. 125), the court held that when a body corporate by the name "Minister Dei pauperis domus de Donnington" made a lease by the name of "Minister pauperis domus Die de Donnington," the variance was not fatal, and Lord Hobart—"So I commend the judgment that seems fine and ingenious, so it tend to right and equity, and namely, that in these cases of captious misnomers, doth mould the small disorders of the record to make good the contract and bargain."

I think we must uphold this verdict against the objection of variance, though it would have been far better if the person who framed the form of the bond had used the true corporate name, and if the pleader, when he found that had not been done, had laid the fact according to the exact truth, by averring that the defendants became bound to the plaintiffs by the name of, &c.

Then, as to the objections which turn upon the condition not having been set out: It would have been better if the condition had been set out, and breaches assigned in the declaration. It is the course recommended as being generally the most proper and convenient; and in such a case as this it is particularly proper, because there is room for question whether these plaintiffs, as public functionaries appointed under a statute, could take bonds on any other occasion or in any other form than the law directs. But I apprehend this corporation may, in the exercise of their legal powers, have occasion to take a single money bond, and that we cannot hold that such a bond as the declaration sets out—that is, apparently a single bond to pay a sum of money—would be void.

Then, the plaintiff having declared on such a bond, the defendants plead *non est factum*; and the plaintiffs shew-

ing a bond such as they have declared on must recover, for the condition is only a defeasance, not part of the bond, and the defendants must avail themselves of it if they wish to plead performance. For all that appears in the bond as set out, or in the bond itself when pleaded, it is a common money bond, not given by the defendants on any particular occasion or in any public or official capacity. It is true that in *Ward v. Griffith* (1 Lord Ray. 83), when the plaintiff declared on a recognizance of bail and omitted the condition, Powell, Justice, said "If the defendant had pleaded *nul tiel* record, the issue had been with him, for a record which comprises that upon which the plaintiff declares and more, is not the same record with that upon which the plaintiff declares."

This must proceed upon the peculiarity of its being a record that was averred; though I confess I think the same principle might have been well extended to ordinary bonds with conditions, and especially when taken to public officers for public purposes; for it is not the same thing to give a bond to pay a sum of money absolutely, and a bond on which nothing can be due until a breach of duty has been shewn. But I take it that as the law is, the plaintiffs were not here bound to set out the condition in order to shew a valid bond, nor in order to guard against any objection of variance if *non est factum* should be pleaded.

Then, as to the remaining objection—that the plaintiff was bound to suggest breaches, and could not take a verdict, as he has done, for the whole penalty upon a bond with such a condition. No doubt this is a bond within the statute 8 & 9 William III. chapter 11, and that the plaintiffs therefore cannot have final judgment and execution to recover the penalty, but must prove breaches and have damages assessed, before the verdict on the issue of *non est factum* can be of any use to them. The court would interfere on motion to restrain execution for the penalty; the only question at present is, whether this verdict must be set aside on the ground that when the bond was produced and the condition proved, it became illegal to render a verdict for the penalty, though

the condition was not set out on oyer and did not appear on the record.

It is true, the condition does not in any manner appear upon this record : for, though the defendants plead that the bond was taken for the special purpose of securing the payment over of the rates collected, yet the plaintiffs deny that, and appear therefore to be suing as upon a single money bond.

In the case of Campbell, executor, v. Lemon (1 U. C. R. 403, O. S.), in this court, I intimated, though the case was not disposed of on that ground, that to take a verdict for the penalty where breaches had not been suggested, though the bond came clearly under the statute, was irregular ; but there the condition was set out on oyer, which makes the question a very different one. I referred in that case to the Chelsea Water-works Company v. Cooper (1 Esp. c. 273), where, on a bond of the same kind as the present—to secure the due payment over of moneys collected—Lord Kenyon refused to allow the plaintiff to recover the penalty, but made the jury assess the damages, on pleas of *non est factum* and *plene administravit*, though, as I take it from the case, no breach had been suggested, for the plaintiffs contended that the case was not within the statute.

So in D'Aranda v. Houston (6 Car. & P. 511), Baron Alderson seemed to think that if in a case like the present, he should take a verdict for the penalty, where no breaches had been suggested or assigned in a replication, such verdict could not be allowed to stand, though he considered that he could not avoid taking the verdict of the jury upon the issue.

On the whole, although if, without any objection having been taken, the plaintiff were in any such case as this to suggest breaches, though after verdict, on a plea of *non est factum*, and go down again before a jury and assess his damages, such a proceeding might be upheld, as the plaintiff, it would seem, may be allowed to suggest breaches after verdict ; yet I think, as the statute has been long ago decided to be compulsory, and as this is a case clearly within it, we should hold this proceeding, when the objec-

tion has been taken to be in disregard of the statute, and to be irregular, as it tends to put the defendants to unnecessary expense, and leads to confusion and inconvenience.

Although the record did not shew this to be a bond within the statute, yet, when the plaintiff produced it in evidence at nisi prius, it was at once shewn to be so, and that the plaintiff had gone down to trial with his record not properly prepared to suit the case. We shall take the course most convenient for both parties, by setting aside the verdict as irregular.

With respect to the pleas, that this bond was taken under the statute 1 Victoria, chapter 21, on which issue was joined: It is clear, I think, on looking at 1 Victoria, chapter 21, sections 17 and 18—4 and 5 Victoria, chapter 10, sections 39 to 57—and 9 Victoria, chapter 20, section 8 to 27—that this bond must be looked upon as taken in conformity to the by-law passed under the authority of 4 and 5 Victoria, chapter 10, and was not taken under 1 Victoria, chapter 21.

The result of our consideration of the case is, that the rule must be made absolute for a new trial, and without costs, on account of the irregularity in not setting out breaches under the statute.

Per Cur.—Rule absolute for new trial, without costs.

BANK OF UPPER CANANA V. ROBINSON.

Notice of trial, when served on the agent of an attorney, being himself the defendant, how far good.

Semble, that the service of a notice of trial upon the agent of an attorney who is himself the defendant in the action, and not representing another, is a good service.

Assumpsit on a promissory note, made by J. Scott to defendant or order, and endorsed by him to the plaintiffs.

Pleas.—1st. A mortgage accepted from Scott in satisfaction.

2nd. A plea which had been demurred to.

3rd. Defendant's endorsement affected by fraud.

Issue on first and third pleas.

Verdict for plaintiff—520*l.* 8*s.* 9*d.*

The defendant obtained a rule for a nonsuit, for irregularity in the service of the notice of trial.

The defendant defended in person on the record. He filed an affidavit stating that on the 18th of October, 1849, he received from a clerk in the office of Messrs. Morrison and Connor, verbal intimation that a notice of trial in this cause had been left in that office, and that he did, *some days after*, receive the said notice; but immediately on receiving the first information from the clerk of Messrs. Morrison and Connor, he made every exertion to procure the attendance of counsel at the trial in Bytown, but that from want of time he could not succeed in doing so, and the cause was in consequence undefended. He was then living in Brantford, and received no further notice.

The clerk referred to swore that he first saw the notice in the office on the 16th of October, and forwarded it to the defendant; and that upon enquiry he could not find that the notice had been served on any one in their office.

The assizes at Bytown began on the 19th of October.

The plaintiffs' attorney swore that on the 11th of October, he served the defendant with a notice of trial, by putting up a duplicate in the office of the clerk of the crown in Toronto, and serving another copy the same day on Mr. Boyd, a clerk in the office of Morrison and Connor, who were then the booked agents of the defendant at Toronto; that the proceedings were commenced and carried on at Toronto, against the defendant, who was an attorney residing at Bytown.

It appeared that the parties, both before and since the trial, have been in treaty for settling this case by the defendant paying the costs merely. Why the defendant had not done what it was agreed by his agent he should do, did not appear. No merits were sworn to.

ROBINSON C, J, delivered the judgment of the court.

Our rule of court (M.T. 4 Geo. IV.) provides that, "when the attorney in any cause depending in this court, resides out of the district in which the action is brought, all notices and demands and other pleadings to be served on such attorney, shall be deemed regular by being put up in the crown office in the district wherein such action is brought, unless such attorney have a known agent in the same district, in which case service on the agent shall be required."

It is sworn here, and not denied, that Messrs. Morrison and Connor were the booked agents of the defendant, who was then and is an attorney of this court, and that they were his agents for this district, where the action was brought.

The notice of trial therefore could not be served by affixing it in the crown office; but it is sworn that it was served on a clerk in the office of the agent, who is named, and there is no affidavit from him to the contrary. But it is made a question whether service upon the agent of an attorney, who is himself the defendant in the action, and not representing another, is a good service.

In *Spragge v. Martin*, in this court (Trinity Term, 1 & 2 Vic.), it seems to have been determined that the service of a summons to compute on the agent of the defendant, an attorney, was sufficient.

I have no note of that judgment, and do not find any English decision in point; but if the propriety of what was then ruled should seem doubtful, we shall not, in a case like this, be inclined to overrule it; for here there has been a proposition made on the part of the defendant to pay the costs of the action, and a willingness expressed on the part of the plaintiff to accede to the proposition. Why this application against the verdict has been afterwards made, is not explained; but as it is not shewn, nor asserted, that there was any defence which could have been urged, and as the only authority that has been cited supports the service of the notice of trial, we must discharge the rule.

Per Cur.—Rule discharged.

DOE DEM. MICHAEL PHELAN V. KINNALLY.

What required to make a simple deed of release of land good.

Where a party does not grant all his interest in the land to A. B., but merely gives up all his right, this is a mere release, and to make it good requires that the releasee should have a previous estate or interest in possession on which the release could operate.

Held per Cur., that the instrument (as set out below) was not a conveyance at all, but an executory contract—an agreement to give a deed.

Ejectment for lot 45, 1st con. North Easthope, county of Huron.

On the 4th of August 1837, the Canada Company conveyed this land to John Phelan in fee.

On the 28th September, 1842, by agreement between John Phelan and his son James Phelan, it was witnessed—
“Now the condition of this agreement is such, that the said John Phelan doth hereby for himself, his heirs, executors, administrators and assigns, *give up unto* the said James Phelan all his right, title and interest in and to lot forty-five, in the first concession of the township of North Easthope, *and to give him a clear deed of the same*; and also one waggon, one fanning mill, two ploughs and two harrows; and the said James Phelan doth hereby for himself, &c., for and in consideration of the above deed and articles mentioned, promise and agree to pay unto the said John Phelan, his heirs or assigns, the sum of 250*l.* in such instalments as are therein mentioned, and also to allow the said John Phelan the use of the dwelling-house in which he now resides, and four acres of land between said house and the concession or side road, during the lifetime of the said John Phelan: In witness whereof, &c.”

It was proved on the trial that John Phelan died in 1847; James his son, the other party to this sealed instrument, having lived with his father and supported him to the time of his death.

It was sworn that James Phelan *went into possession under the instrument.*

The lessor of the plaintiff, Michael Phelan, claimed as eldest son and heir of John Phelan, and he proved a demand of possession before action brought.

The defendant claimed under an assignment from James Phelan. There was no evidence whether James Phelan had or had not paid the 250*l.* mentioned in the agreement.

The question was, whether James Phelan could be said to have taken an interest under the writing proved.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that James Phelan took no legal estate under that instrument; for in the first place, if it can be called an assurance of any kind, it is nothing more than a

mere quit claim or release to a person having no previous estate and not being in possession.

John Phelan does not by this writing grant all his interest in the land, &c., which might be equivalent to granting the land itself, but he merely *gives up* to James Phelan all his right—in other words, releases to him; and this requires that there should be some previous estate or interest in possession on which a release could operate. And in the next place, it is not in fact an assurance, but is an agreement to give a deed, and in consideration of such deed to be given, James Phelan agreed to make certain payments. It is an executory contract, not a conveyance—though being ill drawn, there is an inconsistency in the language.

We think the plaintiff is entitled to the verdict.

Per Cur.—Verdict to be entered for the plaintiff.

MICHIE V. HENRY ALLEN, ESQ.

Judge of Surrogate Court—his exemption from arrest for debt.

The Judge of a Surrogate Court for one of the Counties of this Province is exempt, on grounds of public policy, from imprisonment for debt.

The defendant moved that he be discharged from arrest on the writ of *ca. sa.* issued in this cause, and that the bail bond given by him for the limits be delivered up to be cancelled. His affidavit stated that on the 7th December, 1849, he was arrested on a writ of *ca. sa.* in this case at Toronto, and placed in close custody in the gaol of the County of York, and on the 16th of December was discharged, having given a bond for the limits; that he is Judge of the Surrogate Court for the District of London, by virtue of a commission under the Great Seal of this Province; and is a barrister duly admitted to practice in the Courts of this Province; that on the day on which he had been arrested he had been attending the Court of Chancery as a practising barrister, and at the time of the arrest was returning directly from Osgoode Hall to his place of residence in Toronto. The defendant added a statement of circumstances for the purpose of shewing that he had no intention to leave the

province, or to defraud the plaintiff, and that the plaintiff must have well known that.

ROBINSON, C. J., delivered the judgment of the court.

In this case it seems to be urgent that we should discharge the defendant, if he be really entitled to privilege from arrest for debt, because otherwise considerable public inconvenience may be occasioned by his detention from the district within which his judicial functions are to be exercised. Were it not for this delay which must be incurred, if our decision could be suspended till the next term, I should have liked to have taken further time to consider a question which is of some importance on its general bearing, and not merely as affecting this case ; but my brothers are well convinced, as I am also, that our further consideration of the case would not alter the conclusion we have come to, and which is in favor of the defendant's application, and we therefore make the rule absolute for discharging him.

Referring to what was said by this court in the case of *Adams v. Acland*, decided last term, we feel bound to hold that the defendant being a judge of the Surrogate Court of the district of London, is, on grounds of public policy, exempt from imprisonment for debt. I take his court to be a court of record, of which he is sole judge, having power to imprison others for contempt, being bound to hold his court at certain specified times, and having a jurisdiction to exercise of great and general importance to the public, and as to amount, unlimited.

It would seem most incongruous certainly, that the same system of law which protects witnesses and suitors, barristers and attornies, and other officers of the court from arrest for debts while the possession of their liberty is necessary for their attendance about business depending in the courts, should permit the head of a necessary and important court to be imprisoned, though without his presence the attendance of all these persons in this court can be of no avail to them, however pressing may be the occasion.

So entire an impediment to the administration of justice, the law will not, as we think, permit, for such a cause. At

the same time, it would be more satisfactory if the Legislature should put an end to any question of the kind by providing that gentlemen so situated should be exempt from imprisonment for debt, unless upon a well supported allegation of fraud either in contracting the debt or in disposing of their property, so as to avoid process of execution. Nothing of that kind is pretended in this case.

Per Cur.—Rule absolute.

RUSSELL V. ROWE.

As to proof of a demand of goods, &c., where made the subject of a set-off, instead of a suit.—A prior verdict, how far an estoppel against making the demand recovered the subject of a subsequent set-off.

Though it may be necessary to prove a demand where A. B. is suing C. D., as for a breach of contract in not delivering certain goods, &c., yet where C. D. is suing A. B., and A. B. is *setting-off* this breach of contract against C. D.'s claim, it does not follow that the same demand must then be proved.

Where A. B. is sued by C. D., and is seeking to *set off* a demand for which he has already sued A. B., and has had a verdict—*Held, per Cur.*, that he is estopped by such verdict from bringing the same identical demand a second time before the jury by way of set-off.

Assumpsit on promissory notes made by defendant, payable to plaintiff.

The defendant in his 2nd and 3rd pleas, which were special; varying a little in their terms, but intended to set up the same defence,—namely, that by an agreement between plaintiff and defendant and one Cotton, plaintiff was bound to deliver to the defendants, when they might be required, a certain number of tons of iron bolts, to be used in a public work which the plaintiff had contracted to construct for the government, and which contract had been assigned by the plaintiff to the defendant and Cotton; and that it was agreed between the plaintiff and the defendant and Cotton, that in case the defendant and Cotton should sustain any loss on account of the plaintiff not delivering the said hundred tons of iron bolts as the same might be required for carrying on the works there, the plaintiff should make good the same to the defendant and Cotton upon demand, and that the plaintiff should reimburse them for all expenses they might sustain thereby.

The defendant then averred that on, &c. &c., there still

remained to be delivered by the plaintiff, of the hundred tons of bolts, sixty-five tons ; and that it was then further agreed between plaintiff and the defendant and Cotton, that in case plaintiff should fail to complete his agreement to deliver one hundred tons of iron bolts, any amount which might be due to the defendant and Cotton, in respect of such short delivery, should be deducted from any of the plaintiff's promissory notes (mentioned in the agreement and the plea) at any time remaining unpaid.

Then, after stating that certain notes were given by defendant and Cotton, severally, to plaintiff, on some of which notes given by defendant in pursuance of the agreement he was sued in this action, the plea averred that at the time of these notes being made, it was agreed that in case plaintiff should fail to complete this agreement binding him to furnish the said iron bolts, then any sum which might be due to defendant and Cotton in respect of such failure, should be deducted from any of the said promissory notes at any time remaining unpaid.

The defendant then averred a demand by him and Cotton at various times, of the sixty-five tons of bolts still undelivered at the time of making the agreement ; but that plaintiff did not deliver them, but neglected and refused to do so, whereby defendant and Cotton sustained great loss and damage in carrying on the work, &c. ; that the value of the sixty-five tons of bolts was 2000*l.* and the loss and damage and charges, &c. 1000*l.*, which sum they had after the making of the notes and before this action brought, demanded from the plaintiff, but that plaintiff had neglected and refused to pay ; and that the plaintiff by force of the last-mentioned agreement, became liable to allow upon and to deduct from any of the said promissory notes which remained unpaid ; and he claimed to set off under this agreement as much as was necessary to cover the notes sued upon ; or, rather, the 2nd and 3rd pleas, which stated this defence in nearly the same terms, were intended to shew the notes cancelled according to this agreement, though they concluded very much in the language of a plea of set off.

The plaintiff replied to them, *de injuria*—thereby traversing all the facts pleaded.

The Chief Justice was inclined at the trial to think that from the terms of the agreement, if Cotton and Rowe had been suing the plaintiff in an action for the damages arising from his failure to deliver the full quantity of bolts, they must have averred a demand of the bolts; and must further have shewn default in delivering a certain quantity, and the damage arising to them in consequence; and must also have averred that they had given notice to the plaintiff to the amount of their damages, charges, &c., and demanded payment; but as the plaintiff was suing them on their notes, and endeavoring to compel payment of their full amount, he thought the defendant Rowe must be entitled in defence, to claim any deduction to which he should then show himself entitled, though he had not before made a claim of those damages and stated the amount. This difference, he thought, naturally resulted from the fact of plaintiff suing him for the whole amount of the note; but, as the point might be doubtful, he reserved leave to the court, by assent of the parties, to order the addition to the plaintiff's verdict of whatever might by the jury be allowed to defendant as a set off on account of the bolts. The plaintiff proved a demand due to him on the notes of 1179*l.* 17*s.* 6*d.*, and the jury found a short delivery of iron bolts to the amount of 986*l.* 17*s.* 6*d.*, and gave plaintiff a verdict for the balance 193*l.* 1*s.* 5*d.*

Burton obtained a rule to increase the verdict to the whole amount of the demand proved, by striking out the sum allowed on account of the iron bolts, or for a new trial on account of this allowance having been made. *Cameron* shewed cause. The authorities cited were—1 Tyr. & Gr. 34; 1 W. W. & H. 586; 4 Nev. & Man. 594; 1 Cr. M. & R. 709; 5 Tyr. 488; 1 Wils. 98; 9 Price 89; 5 Dowl. 267; 9 Dowl. 408; 8 Dowl. 514.

ROBINSON, C. J., delivered the judgment of the court.

I cannot say that I think there was any defect in the defendant's case at the trial, from his not proving that he had expressly demanded bolts for the work, which were

not supplied, because the evidence was that the plaintiff had professed to send the whole quantity; but that when the cargoes came to be delivered, the quantity was found to be short to the extent of the deficiency claimed for.

As the plaintiff had professed to send all, I thought, and yet think, that the jury might well assume that he had been requested to do so; and that any proof of an actual demand was unnecessary: that applied merely to the request to deliver.

Then the next question was as to the necessity of proving what the pleas averred, that the defendant had before action given the plaintiff notice of what his damages and charges amounted to, and demanded to have the amount allowed on account of the notes. I did not at the time see that this was a material averment. It is true that as to the defendant's losses and charges in consequence of non-delivery, they were peculiarly within his knowledge, as to amount; and it may be therefore that a well-known principle of law in such cases, applied in this case, and made it necessary for the defendant to inform the plaintiff of the amount before he could sue him as for a breach of contract in not paying a sum which he had no certain knowledge of; but here the plaintiff was himself suing, and I therefore thought that the defendant might, so far only as this objection was concerned, be well allowed to shew his loss and charges and the amount in resisting the action, so as to exempt himself from paying what the plaintiff had agreed to deduct, and yet was proceeding to enforce.

But this merely regards a point of evidence, arising from the peculiar nature of the agreement. At the trial it was objected that the defendant had actually brought an action against the plaintiff for this very alleged default in not delivering the full quantity of iron bolts; and that he had recovered such damages as the jury thought it just to give him: and notwithstanding this, he was now setting up the value of those bolts and his damage from not recovering thereon, as constituting a claim for deduction in this action—a sort of special set off under the agreement. I could not but know that the fact was really so, for this court had

under their particular consideration the evidence in the former action against Russell on account of these bolts, and had, after much examination, confirmed the verdict given by the jury, though the plaintiff (the now defendant and Cotton) complained that it was not large enough, and desired to have it, on that ground, set aside.

Under such circumstances, it surely ought not to be allowed that the defendant should recover compensation twice for the same alleged breach of covenant, first in an action brought by himself, and afterwards by way of set off in an action brought against him by the plaintiff.

After a new trial had been refused by the court, which had been moved on the ground of smallness of damages, the defendant is thus seeking to give himself the advantage of the new trial which had been refused.

It is not only known to us judicially that the defendant has already as plaintiff recovered compensation for what he has in this action advanced as a set off; but that fact is distinctly stated and admitted in the affidavits filed in this cause, and which are now before us.

It has sometimes happened that at the same assizes, cross actions have stood for trial, in one of which the plaintiff has brought his action for a demand which he has also made the subject of a set off in the cross action in which he was defendant. In those cases there has been as yet no investigation of the truth of the demand; and neither party can yet tell whether the verdict which may be rendered in either case will be final. It cannot be foreseen what casualties either case may be subject to, arising from absence of witnesses or otherwise; and the plaintiff who is suing for his debt in the one action, may reasonably therefore advance the same debt as a set off in the action brought against him, in order to save himself from costs, and from being harassed with an execution while he may be unable to bring his own cause to trial. So in this case, when the defendant pleaded these pleas, and when the plaintiff replied to them, there had been no trial yet had of the action against Russell by these defendants for damages for non-delivery of the bolts; but before the trial of the

present action, that action of the defendants had been tried and their damages assessed at 300*l.*, and yet a year after, the same pleading standing upon the record, the defendants bring up the same demand again on the trial of this cause for which they had already recovered a verdict for 300*l.*; and the plaintiff being, as he declared, taken by surprise at the trial by this attempt to recover, in effect, a double compensation for the same claim, was not prepared to resist it, and having no evidence to give respecting it, the defendant succeeded in obtaining a reduction in the verdict on account of the non delivery of the iron bolts to the amount of 986*l.* 18*s.* 6*d.*

When the defendant pleaded these pleas and the plaintiff replied to them, nothing had yet occurred which could give the plaintiff reason to suppose that the subject matter of these pleas might not be properly investigated on the trial of this cause; but when this cause came down to trial a year afterwards, and the defendants had in the meantime obtained their verdict for 300*l.* for the failure to deliver the bolts in question, the plaintiff in this cause had certainly no reason to expect that an attempt would be made to open that claim again, and to obtain an allowance for it as a kind of set off to his demand in this action—the former verdict still standing in force.

There is no doubt the defendant cannot be allowed to take the course which he has done. In *Laing v. Chatham* (Campb. 252), Lord Ellenborough, in a case where a defendant having pleaded a set off did not appear to support it, allowed the plaintiff to take a verdict, if he chose, for the smaller sum, deducting the set off, after which, he said if the defendant should bring an action for the set off, the court would stay proceedings; and an entry was directed to be made on the *postea*, showing on what principle the verdict had proceeded.

The case of *Eastmure v. Laws* (5 Bing. N. C. 444), shews clearly that the defendant in this case was estopped by his former verdict from bringing the same identical demand a second time before the jury, by way of set off in this action afterwards tried.

The only thing to be considered is, whether we should at once direct the verdict to be entered for the larger sum, striking out the 986*l.* 18*s.* 6*d.* or grant a new trial on account of its having been allowed.

We should take the former course, I think, for there is no object in granting a new trial; the facts stand admitted; and the law is clear that the defendant is estopped by the verdict rendered in the first action in his favor. See 3 Ea. R. 346. 7 Scott 461; 2 Arch. Prac. 1210; 1 Camp. 252; 1 Chitty's Rep. 878 note.

Per Cur.—Rule absolute for increasing the verdict by striking off the amount allowed by the jury as a set-off.

DAVIS v. McSHERRY.

Promissory note—parol evidence how far admissible to vary.

Parol evidence is admissible to deny the receipt of value for a bill or note, but not to vary the engagement to pay the amount at the time specified.

Where the defendant, however, at the trial, disclaiming any wish to succeed against the justice of the case, assents to the reception of parol evidence to prove the understanding on which a note was given, and a verdict is given against him, he cannot be allowed afterwards to argue *in banc* the technical objection he had waived at the trial.

Assumpsit on a promissory note made by the defendant on the 9th of November, 1847, payable to the plaintiff or bearer in a year, for 62*l.* 1*s.*

Pleas—1st. *Non fecit.*

2nd. That the note was given for the plaintiff's accommodation.

3rd. That before the making of the note the plaintiff had become security for the defendant, to the commissioners for the Gore District Turnpike Trust, for the amount of the purchase money of a certain toll-gate farmed out by the commissioners to defendant for a year—viz. from October 1847, to October 1848—and that the note was given to plaintiff in order to secure him against any loss by so having become security: that it was then agreed by the parties, and the note was delivered by defendant to plaintiff upon the special condition, that if the plaintiff should not suffer or incur any loss or damage in consequence of so becoming security, then no demand was to be made at any time by plaintiff upon defendant on the note, and that defendant should not

be held liable to pay the same ; and the defendant averred that the plaintiff had suffered no loss or damage in consequence of having become such security.

4th. That when the note was made the plaintiff and defendant were jointly interested as copartners in the profits to be derived from a certain toll-gate, &c., then lately taken from the commissioners by the defendant for a year, &c. ; that the plaintiff requested the defendant to make and deliver this promissory note to him for 62*l.* 10*s.*, payable to him, as the plaintiff's probable share of the profits to be derived from the gate, *upon the understanding* that if the plaintiff's share in the profits should not amount to 62*l.* 10*s.*, then the plaintiff should re-deliver to the defendant the said note, and make no claim against the defendant thereon. And the defendant averred that he did make and deliver to plaintiff this note upon that express condition, that if the plaintiff's share in the profits to be derived from the toll-gate at the end of the year should not amount to 62*l.* 10*s.*, then the plaintiff should re-deliver the promissory note to the defendant and make no claim against him thereon ; and the defendant averred that the share of the plaintiff in the profits derived from the said toll-gate at the end of the year, did not amount to 62*l.* 10*s.*, and this he is ready to verify, &c.

The plaintiff replied *de injuria*, &c., to the 3rd and 4th pleas, and took issue on the others.

At the trial several witnesses were called for the defence, whose evidence proved that the defendant lost by taking the gate at the sum of 932*l.* ; and, that the commissioners being satisfied of that fact, made him an abatement of 25*l.* on that account ; that this plaintiff was himself also satisfied that it was so ; and admitted that he was to give up the note, but afterwards gave evasive answers, and declined to abide by his agreement, and brought this action.

The plaintiff called a witness who was present when the note was signed, and who indeed drew it ; he said he knew nothing more of the agreement between them than what he happened to hear then, while they were in the bar room of an inn ; they had evidently been talking the matter over between themselves before ; he thought he had drawn,

at the same time, a paper assigning over to defendant the plaintiff's interest in the gate, but he was not quite sure, and that he had heard nothing since about the note not being to be paid unless there were a profit on the gate.

The plaintiff seemed willing to go to the jury unreservedly upon the question of fact, whether the note had been given on such a condition as the defendant asserted, and which he proved by the testimony of a witness; or whether the fact was, as the plaintiff contended, that he and the defendant had a private agreement between themselves that the gate which had been bid off by defendant alone at the sale should be held by them jointly on equal terms as to profits; and that the defendant had afterwards bought the plaintiff out, giving him this note for his interest, and taking his chance of what the profits might be.

The jury was satisfied by the testimony on the part of the defendant, that the note had been given on the express agreement that nothing was to be paid unless the gate yielded a profit; and as it was certain that it had not, they found for the defendant.

The plaintiff by *Freeman*, his counsel, moved for a new trial on the law and evidence for the reception of improper evidence, and on affidavits. He contended that by law the defendant could not give parol evidence of an understanding at variance with what the note imported, though on the trial he seemed so confident that no such agreement could be proved by any evidence, that he rather challenged the defendant to shew it if he could, and did not rest on the legal objection which he took *in banc*.

R. Duggan shewed cause.

Cases cited—3 Campb. 57; 8 Taunt. 92; 3 B. Ad. 2333; 10 B. & C. 762; 5 Tyr. 255; 13 Jurist, 153; 1 M. Gr. 79.

ROBINSON, J., delivered the judgment of the court.

With regard to the objection taken now by Mr. Freeman, that evidence was improperly received of the understanding on which the defendant contended the note was given, he might be found to be correct if he were strictly entitled in this stage to raise that objection. It would depend, I think, upon whether the parol evidence given must be con-

sidered as referring to the consideration, or to the terms of the engagement.

In one case cited by Mr. Freeman—*Mozely v. Hanford*, (10 B. & C. 730,) the doctrine is very precisely stated by Baron Parke: "Every bill or note," he says, "imports two things—value received, and engagement to pay the amount on certain specified times; and evidence is admissible to deny the receipt of value, but not to vary the engagement."

Now, in this case, if it were true that the defendant did agree to give the plaintiff 6*l.* 10*s.* for his interest in the gate, and gave his note for the money, then no proof could be received of a prior or contemporaneous agreement that the note should not be enforced unless there should be profits on the gate sufficient to pay it; but there is room, I think, for contending that the evidence here went rather to the question of whether the defendant had received any consideration; for, as the defendant's principal witness represented the matter, it was always doubted whether there would be anything to divide, and the defendant gave his note only to be retained as a security till it should be known whether there would be any profits.

It is, however, my impression, that this case is within the rule which renders the evidence inadmissible; still the plaintiff disclaiming any desire to succeed against the justice of the case, and declaring his confidence that the defendant could prove no understanding of the kind, consented to go to the jury without insisting on the technical objection; and the jury having found for the defendant, I think we should not now set their verdict aside.

It stands uncontradicted that the gate was a losing concern that year, &c.; that so far from the defendant realizing anything, he lost considerably by it. That seems not to be doubted, and clear evidence was given of the fact. Then the plaintiff furnished neither stock nor capital of any kind—the nature of the thing not requiring it; he was at no loss, gave no labour, and did nothing that should entitle him in justice to expect a sum of money from the defendant. It is not pretended that any diligence, or any means that could have been used by the defendant, could have increased

the receipts, and under such circumstances it seems hard and unreasonable that the plaintiff should seek to add to the defendant's loss by desiring to have his note paid. And on that account, as the plaintiff chose to go to the jury upon the evidence without exception, we think we should let the verdict stand.

Per Cur.—Rule discharged.

DOE DEM. GEORGE CAREY ET AL. V. CUMBERLAND.

Mortgagor—Mortgagee—Assignee—Disseizin.

Neither the mortgagor nor his assignee can be disseized by the mortgagor continuing in possession.

The assignee of a mortgagor's interest, through the medium of a sheriff, after the mortgage has been satisfied, cannot be looked upon as a tenant at sufferance to the mortgagee. A conveyance, therefore, made by the mortgagee while such an assignee was in possession would be void.

Ejectment for part of lot 1, 3rd con. Barton.

The facts were, that George Carey, father of the lessors of the plaintiff, on the 27th of August, 1836, mortgaged this land in fee to James Scott, junior, for £357 5s. 3d., to be paid in one year.

The mortgage money was proved to have been paid to the attorney of the mortgagee, on the 27th of October, 1839, but no release of the mortgage was taken. Notwithstanding this payment, the mortgagee, on the 16th of May, 1840, executed an assignment of the mortgage to James Scott, the elder, who, on the 9th September, 1847, assigned it to George Carey, the younger, one of the lessors of the plaintiff; and it was under this assignment of the mere legal estate, made after satisfaction, that this lessor of the plaintiff claimed title. What the other lessor had to do with the estate did not appear.

The defendant's title was not shewn, but it was proved that he had been in actual possession for more than five years, claiming the fee under a purchase made by him from one Cahill, who, he said, had bought the estate at sheriff's sale, under a *fieri facias* against the mortgagor, George Carey.

Upon this state of facts, it was contended, that the deed made to George Carey, junior, in September, 1847, could

pass no estate, the defendant being at the time in actual possession, claiming the fee adversely to the grantee in that deed.

The Chief Justice directed a nonsuit.

The plaintiff, by *Duggan*, moved for a new trial without costs, contending that there was an exception in this case to the general rule; for that this defendant, being in effect the assignee of the mortgage, his possession could not be treated as adverse to that of the mortgagee, or of any one claiming through him, so as to disable the mortgagee, or any one claiming under him, from conveying.

Freeman shewed cause.

Cases cited—5 U. C. R. 290; 3 Leu. 387; 1 Dougl. 22; 5 B. & Al. 687; 1 T. R. 378, 383; 9 Ves. 411.

ROBINSON, J. C., delivered the judgment of the court.

It is no doubt a general principle, that the mortgagee cannot be disseized by his mortgagor continuing in possession; neither would such possession of mortgagor be any more a disseizin of the assignee of the mortgagee—*Smartle vs. Williams*. 3 Lev. 387.

If George Carey the mortgagor had continued in possession, the mortgage being unsatisfied, James Scott the younger, could no doubt have made a legal assignment of the mortgage, as is done every day; and such assignee could equally assign to another, while all the time the mortgagor might be still in possession, receiving the rents and profits.

It is strange that no account was given of the reason of the mortgagee assigning to his father, a few months after he had been paid the mortgage money in full. The payment was proved, in the clearest manner, by the mortgagee's own attorney, and did not seem to be denied. There must be something in the case that has not been explained.

As it stands, it appears that some other creditor of Carey's sold his equity of redemption under a *fieri facias*, a proceeding which has been always held, here as in England, to be futile, though a late statute has made a change in our law in that respect.

When this sale took place—whether before or after the

mortgage had been satisfied, was not shewn: and, indeed, the case was very much left to explain itself.

A new trial is now asked for in order that the facts may be more fully brought out on another trial; but to grant this when no reason is shewn, for the party not being prepared to prove his case on the first trial, would be setting a bad precedent; and the nonsuit not being final, there is no good reason why it should be done.

Still, we must consider whether the plaintiff was rightly nonsuited upon what did appear on the trial. So far as the jury were informed, the defendant was assignee, by the medium of a sheriff's sale in execution, of the mortgagor's interest; and my impression is, that the sale took place after the mortgage had been satisfied; and, if that were so, then I think we could hardly look upon the mortgagor's assignee as tenant at sufferance to the mortgagee, whose claim to the possession was at an end before this defendant entered, though he might hold the dry legal estate.

Whether a certificate of discharge was registered, under our provincial statute, was not shewn.

No additional account is given of the matter by affidavits in moving this rule; and having only the information which was before the court at the trial, we cannot determine that the nonsuit was improper.

It is to be remembered that George Carey, the mortgagor, is still living: neither of these lessors of the plaintiff represents his interest. All that is shewn is, that one of them, George Carey the younger, in 1847 obtained a conveyance from a person who took an assignment from the mortgagee seven years before, and after the mortgage had been satisfied.

Per Cur.—Rule discharged.

REES v. DICK.

Trespass—Argumentative plea of not possessed—When plea should commence with actionem non.

Where to a declaration in trespass charging trespasses committed on *divers* days, &c., the plea answered trespasses *committed at the said time, when &c.*: *Held per Cur.*—Plea bad on special demurer.

A plea pleaded to part only of the cause of the action, if *in bar* to that part, need not commence with the *actionem non*, and conclude with the prayer of judgment.

To an action of trespass for breaking and entering the plaintiff's close, and pulling down the fences &c., the defendant pleaded that he was lawfully possessed of a close next to the plaintiff's close described in the plaintiff's declaration, which close of the defendant the plaintiff claimed as part of his close mentioned in the declaration, and so, claiming it as his, wrongfully put up a fence there; and that the defendant took up the fence, posts, &c., wrongfully encumbering his close, and removed them to a convenient distance, as he lawfully might, &c.: *Held per Cur.*, on demurrer to this plea, plea bad—as being an argumentative plea of not possessed.

Declaration.—Trespass, for breaking and entering, on the 6th of July, 1849, and on *divers* other days and times, the plaintiff's close, and trampling upon the grass, &c., and cutting down the posts and fences, and carrying them away, converting them to his own use.

2nd plea.—As to breaking down the fence and posts, carrying them away, and converting them to his own use, the defendant alleged, that at the said time when, &c., he was lawfully possessed of a close next to the plaintiff's close described in the declaration, which close of the defendant the plaintiff claimed as part of his close mentioned in the declaration, and so, claiming it as his, wrongfully put up a fence there; and that the defendant took the posts, boards &c., (composing the fence,) wrongfully encumbering his close, and removed them to a convenient distance, as he lawfully might, &c. This plea did not commence with the *actionem non* and conclude with the prayer of judgment.

Demurrer to this plea.—1st, Because it only answered trespasses committed at the said time, when, &c., when the count to which it was pleaded charged trespasses committed on *divers* days. 2nd, Because being pleaded to part only of the declaration, it did not commence with the *actionem non* and conclude with the prayer of judgment. 3rd, Because the matter of the plea amounted only to an argumentative denial of the plaintiff's possession.

There were two other pleas, setting up defences which, in their form and matter, brought up the same questions on demurrer as arose on the 2nd plea; they are noted in the judgment of the court.

Gwynne and *Galt* for the demurrer.—They cited 10 A. & E. 763; 1 Ch. Pld. 539–552; 1 Q. B. R. 496; 5 Dowl. 72; 2 M. & W. 72.

Bell contra, who cited 2 M. & W. 72; 5 Bing. N. C. 338; 1 P. & D. 657; 1 G. & D. 21; 2 Cr. & M. 329; 1 Saund. 346, note 2.

ROBINSON, J. C., delivered the judgment of the court.

We are of opinion that the 2nd plea is bad on special demurrer; first, because it only answered trespasses committed at the said time when, &c., as if the plaintiff had complained of trespasses committed on one occasion only, when the count to which it is pleaded charges trespasses committed on several days.

As to the want of the *actionem non* in the commencement of the plea, and the prayer of judgment in the conclusion, it must be taken to be settled that these are unnecessary where the plea, though only pleaded as a defence to part, is not merely to the further maintenance of the suit, but is in bar of the action as to that part of the complaint which it assumes to answer. *Weeding v. Aldrich*, 9 Ad. & Ell. 861; *Ratton v. Davis*, 1 Q. B. R. 496, and *Putney v. Swann*, 2 M. & W. 72,—shew that the Queen's Bench and Exchequer concur in placing that construction on the new rule of pleading which we have adopted; though in *Upward v. Knight*, 5 Bing. N. C. 338, the Court of Common Pleas has held otherwise. We do not, therefore, hold that exception to be well founded.—1 Saund. 290.

As to the matter of defence pleaded in this plea: the defendant alleges in it that he was lawfully possessed of a close next to the plaintiff's close described in the declaration, which close of the defendant the plaintiff claimed as part of his close mentioned in the declaration, and so claiming it as his, wrongfully put up a fence there (that is, on the close of which the defendant was lawfully possessed), and that the defendant took the posts, boards &c. (composing this fence) wrongfully encumbering his close, and removed them to a convenient distance, as he lawfully might &c. The defendant, no doubt, could single out this particular part of the injury complained of, and answer it alone as he has done; and if the matter of his plea involved no denial of the complaint in the declaration except what applied to the posts and rails, then the objection taken that

the plea does not give colour, would not apply ; because, as regarded the posts, rails &c., there would be implied color, the plaintiff's property in them being admitted, and also the removal of them by the defendant ; for which removal there would be *prima facie* a right of action, till the defendant should shew in excuse that they were encumbering his close.

But the plea as it stands, is, we think, clearly subject to the exception taken ; for it does bring in question the plaintiff's right of possession of the close named in the first count, since the defendant and the plaintiff could not be, at the same time, both lawfully possessed of the close in which the fence was. The plaintiff's complaint is, that the defendant entered *his* close and pulled down and removed his fence, &c. The defendant answers, that he was himself lawfully possessed of the close in which the fence was ; which denies, plainly, the plaintiff's right of possession, on which he grounds his action. The point, who had the right to possess the close, or, rather, who was actually possessed of it, is involved in the plea ; and as to that, no implied color is given. It is an argumentative plea of not possessed, which the defendant, if the facts he has stated be true, could have pleaded in the common form, concluding at once to the country ; and such a plea would have been a full answer to what is here justified, as well as to the complaint of an entry into the plaintiff's close. On this ground also, I think, we must hold the plea bad ; because it obliges the plaintiff to reply specially, when he must confine his traverse to some single point, while, at the same time, the plea which imposes this necessity upon him does not give implied colour ; and this is contrary to the principles of pleading.

The 3rd plea has the same fault of justifying only trespasses committed on one day, when several trespasses on several days are complained of. As to the matter of this plea, we cannot see on the record whether the tract which the defendant describes does, or does not in fact form part of what the plaintiff has in the second count described as his close ; and the defendant does not take upon himself

to affirm that it actually does form part of it; all he says is, that "as to so much of the tract which the plaintiff speaks of as is comprehended within the tract which he, the defendant, speaks of, &c.," (which may, for all we can tell, be none at all); he, the defendant, was lawfully possessed of it, &c. But, admitting that we could see on the record that the defendant has described a certain tract which forms part of the close called by the plaintiff his close, then the defence in this plea is founded on a denial that the plaintiff was possessed, as he has stated, and is bad, in my opinion, for the reason which applies to the second plea—namely, that it is a special argumentative plea of not possessed.

The 4th plea appears to be liable to the same exceptions, and to this additional one, as it stands in my copy of the demurrer book, that it professes to answer the whole of the 3rd count, but only, in fact, answers part of the wrongs complained of in it. It varies from the other pleas in stating that the part of the close in which the fence was put up was the defendant's freehold. We are of opinion that the plaintiff is entitled to judgment on all the pleas.

Per Cur.—Judgment for the plaintiff on demurrer.

GREGORY ET UX. V. CONNOLLY.

Executor—when he can be said to have the fee, or a naked power to sell under the will.—Action of account as between tenants in common or joint tenants,—statute 5 Anne, ch. 16,—right of coparceness to sue under this act.

Where the testator directs his executor, as soon as convenient after his death, to make sale, to the best advantage, of his estate—first for the payment of debts, and then to divide the surplus proceeds amongst his children: *Held per Cur.*, that the executor in such case takes no estate in the land, but merely a naked power to sell, the fee in the meantime descending to the children.

At common law there can be no action of account by one tenant in common or joint tenant, unless there has been an appointment of one by the other as bailiff.

Under the statute, however, 5 Anne, ch. 16, one tenant in common, or joint tenant, may be sued as bailiff, in an action of account whenever he has entered and taken more than his just share of the profits, whether by appointment of his co-tenant or not.

Semble, that coparceners, not coming within the statute 5 Anne, ch. 16, sec. 27, cannot sue each other in an action of account. This point, however, was not expressly decided; as the court held, that in this case the facts shewed that the defendant entered into possession of the land not as a coparcener claiming through his wife and in privity with the plaintiff, but as an executor claiming adversely to the plaintiff, without his consent; and that, on that ground, the action of account would not lie.

Upon the special verdict rendered in this case, it appeared that Anne Hannigan died in 1846, seized in fee of

certain premises, having made her will in September, 1846, by which she appointed this defendant, Connolly, and one Gibson, her executors, and directed that her debts and funeral expenses should be paid out of her personal estate ; and further *directed her executors, as soon as convenient after her death, to make sale, to the best advantage, of her estate in March Street*, (being the premises in question,) and to pay, out of the proceeds, to her grand daughter, on her attaining 21 years or marrying, £100 ; and after payment of that sum and another sum mentioned, then she directed that the residue of the money to be obtained by selling her estate, should be divided equally among her three daughters, Bridget, Rose, and Mary.

Bridget is the wife of the defendant, Mary is the wife of the plaintiff, and Rose is the wife of one Bernard Short. These were the only lawful issue of Anne Hannigan.

It appeared that the executors, without delay, proposed to sell the lands, but that Gregory and his wife objected to the executors either selling the land or receiving the rents due at the time of the death of the testatrix, or to grow due before the lands should be sold ; that the defendant, Connolly, *as one of the executors*, took temporary possession of the estate, believing that he had the right to do so under the will, and received the rents and profits as such executor with Gibson, which possession was adverse to Gregory and his wife, and contrary to their desire and consent.

Before bringing this action of account, a demand was made upon the defendant, by the plaintiffs, to account for the rents and profits, or for the plaintiff's share thereof, when the defendant refused to consent, alleging that he had received the rents and profits as executor under the will, and that he had sold the premises as executor, and had received nothing for or on account of the plaintiffs.

The plaintiffs, Gregory and his wife, on these admitted facts, brought this action of account against the defendant Connolly, one of the executors, and the husband of one of the co-heiresses.

In one count of the declaration, they charged him as bailiff, receiving the rents and profits for the common profit of the three co-heiresses and their husbands.

In another count, they charged the defendant as bailiff, bound to account &c., and averred that he received the rents and profits to his own use, and had refused to account to the plaintiffs for their share.

In the last count, they declared, under the statute 5 Anne, ch. 16, against the defendant as bailiff appointed to receive the whole rents and profits, and to account to the plaintiffs, under the statute, for what he should receive more than his share; and the plaintiffs averred that the defendant did receive more than his just share,—to wit, the whole,—and though requested, had refused to account to the plaintiffs for their share.

The defendant pleaded—1st, That he was not nor is bailiff of the plaintiffs, to receive the rents or profits for their use, in manner and form, &c.

2ndly, That the three daughters of the testator were not nor were either of them seized in fee, &c.

3rdly, He denied a request to account. (*a*)

A. Wilson for the plaintiffs. He referred to the following authorities:—5 Anne, ch. 16, sec. 27; *Viners Ab. Acc. C. Pl. 2*; *Bac. Abr. Account A*; *Fitz. Nat. Bre. 118 (I)*; *Willes 208*; *13 M. & W. 17*; *13 Jurist 150*; *5 Bing. N. C. 288*.

Durand for the defendant. He cited *Co. Litt. 200*; *1 Stephens N. P. 2*; *Selw. N. P. Account*; *Willes 210*.

ROBINSON, J. C., delivered the judgment of the court.

As regards the second plea, which denies that the daughters of the testatrix were seized, although perhaps it might have been more convenient and consistent to have held that in all cases of wills containing such a direction as this does, the executors were constituted devisees upon trust to sell, yet the point is too plain upon authority to admit of any doubt that the executors in this case do not take any estate in the land under the will, but have a naked power to sell, the fee descending in the meantime to the co-heiresses.

The plaintiffs were entitled, in our opinion, to have a verdict entered for them on the second issue; and also upon

(*a*) The question was, whether, upon the special verdict as stated above, the plaintiffs could sustain their action of account against the defendant.

the third, for it is expressly found, by the verdict, that the plaintiffs did make such a demand as the plea denies.

But with respect to the right to bring account—on the facts of this case it seems to us clear that there is no foundation for the action. At common law it is certain there could be no action of account by one tenant in common, or joint tenant, against another, unless there had been an appointment of one by the other as bailiff, which is wholly out of the question in this case, on the facts.—Co. Litt. 172 (a) 200 (6); Dyer 377; Pl. 59.

Then it only remains to be considered whether this is a case under the statute 5 Anne, ch. 16, sec. 27, which provides "*that an action of account may be maintained by one joint tenant and tenant in common against the other as bailiff, for receiving more than comes to his just share or proportion,*" and whether the special verdict will support a recovery under the third count, for neither of the other counts can be sustained.

Coparceners are not, strictly speaking, within either of the terms joint tenants, or tenants in common, differing in some incidents from both; and I do not find express authority for holding that an action of account would lie under the statute by one coparcener against another, who had received more than her just share of the profits. It is, however, a general principle, that statutes which give a remedy in advancement of justice are to be liberally construed; yet I am not satisfied that we could hold that this count could be sustained as shewing a good action of account under the statute, when the plaintiffs are not suing in either capacity mentioned in the statute, but expressly as co-heiresses—that is, as parceners.

It is one thing to extend a liberality of construction as it is done in some cases, by treating persons as coming within a certain definition, when in strictness of speech they are not within it; but it is another thing to treat a case as coming under a statute which is not so stated as to come apparently under it,—*nullum simile est idem*,—and while these plaintiffs are suing under the statute they state a case out of the statute.

Then, although I take it that, in a case under the statute, a joint tenant, or tenant in common, may be sued as bailiff, not merely when he has been authorized by his co-tenant to manage the estate for him, but wherever he has entered as co-tenant and received more than his just share of the profits, yet I consider it clear that, in a case like the present, which stands admitted or proved that the defendant in an action of account did not enter or occupy as co-tenant, but in his own right, claiming adversely under a title with which the plaintiff has no privity, it is impossible to treat the defendant as bailiff of the plaintiff.

It is not shewn here even that the defendant was married to one of the co-heiresses when he entered; all that is found is, that he entered as executor, not claiming a title on behalf of or in right of his wife as co-heiress, but claiming and really believing that the fee was in him and his co-executor under the will; and that he received the profits, not as tenant in common, or joint tenant with the plaintiffs, but as executor with his co-executor Gibson, adversely to these plaintiffs, and against their consent.

We consider it clear, that in such a case there can be no action of account under the statute more than at common law; and that the defendant is entitled to judgment on the first issue. The remedy by action of account is now never resorted to scarcely in England, the parties going to equity instead; but I take it to be clear that, when there has been neither fraud nor concealment, nor any privity, a court of equity would not decree an account. The parties would be left, in such cases, to their ejectment and their action of trespass for mesne profits.

Per Cur.—Judgment to be entered for defendant on the first issue.

BOYES V. JOSEPH.

Foreign bill—as to averment in declaration of its being such. As to due presentment and due notice to drawee and drawer of a bill drawn in Toronto, upon New York, in favor of a party in Illinois.

Where a bill had been so declared upon as not to shew it to have been a foreign bill, and when produced at the trial it appeared to be a foreign bill, drawn in Toronto, on a party in New York: *Held per Cur.*, that this was not variance upon which a nonsuit could be granted.

A bill of exchange, drawn in Toronto, on the 6th of August, 1849, by a party dealing in bills, upon a party in New York, payable at sight, in favor of a party living in the state of Illinois, to be sent there as a remittance, and for circulation, was presented in New York on the 10th of November following: *Held per Cur.*, that the delay in presenting the bill to the drawee in New York could not, under the circumstances, be held to be laches on the part of the holder. *Held* also, that a notice to the drawer, from the holder living in Illinois, through his agent in this province, of the bill being unpaid, by the latter calling upon him with the bill, on the 24th of December, the bill having been presented in New York, on the 19th of November, could not be considered—under the facts of the case given below—as taches on the part of the holder in giving due notice of non-payment.

Where the holder is suing the drawer of a bill upon which there has been several intermediate endorsers, it is not necessary for the holder to shew notice given from each endorser within the regular period; all that the holder is required to do, in the first instance, is to shew due notice to the party against whom he is proceeding.

The plaintiff declared, in the first count of the declaration, on a bill of exchange, drawn on the 29th of December, 1848, by the defendant, on H. Dwight, the younger, in favor of plaintiff or his order, at sight, for 322 dollars—80*l.* 10*s.*—alleging presentment on the 1st of April, 1849, and protest for non-acceptance, notice to defendant, and his promise to pay.

In the second count, the plaintiff declared on another bill of exchange, drawn on the 6th of August, 1849, by defendant, on H. Dwight, the younger, at sight, in favor of plaintiff or order, for 344 dollars 80 cents—86*l.* 4*s.*—averring presentment on the 10th of October, 1849, and protest for non-payment, notice to defendant the drawer, and promise by him to pay.

Common counts for money received by the defendant to the plaintiff's use, and on an account stated.

Pleas—1. To the first count, *non-fecit*.

2. To the second count, denying presentment.

3. Denying due notice of non-acceptance.

To second count the same pleas.

7. Non-assumpsit, to third and fourth counts.

8. To the first count, that the defendant, on the 6th of August, 1849, paid 86*l.* 4*s.* to the plaintiff, in full satisfaction of the cause of action in the first, and the defendant accepted, &c.

9. To first count, the making and delivering to the plaintiff of another bill, (the same as that declared on in the second count,) in satisfaction of the first, and of all damages &c., which defendant accepted, &c.

10. The first bill delivered up and cancelled, by agreement between plaintiff and defendant.

11. A plea demurred to.

12. Plea, to the first count, that the bill of exchange mentioned in it was made payable to the plaintiff by the name of Harman Boyes, or his order; that the plaintiff endorsed it by the name of *Harman M. Boyes*; that it came, by subsequent endorsement, to one Edward Houghton, who presented it to the drawee, and that the drawee, not knowing the plaintiff or his handwriting, refused to accept the same, on account of the variance in the names; and that the bill was returned to plaintiff, who became the holder thereof before this action was brought; and that the non-acceptance of the bill was by reason and in consequence of the plaintiff's own neglect and improper endorsement.

13. To second count, that, at the time of commencing this suit, the plaintiff had endorsed and delivered the bill mentioned in that count to some person unknown to the defendant, and was not the holder thereof.

14. To the second count, that the bill in that count mentioned was not presented to Dwight for his acceptance within a reasonable time.

15. To second count, that Dwight was not, within a reasonable time, requested to accept the bill.

16. To second count, that, from the making of the bill to the time of presenting the same, the plaintiff was the holder thereof, and kept it from circulation; that the request to accept was made by the plaintiff after he had suffered an unreasonable time to elapse, to wit, two calendar months; and that so plaintiff was guilty of gross negligence and delay in presenting the same for acceptance; and that by reason

of such negligence and delay, Dwight refused to accept the same.

The plaintiff replied, joining issue on the first seven pleas.

He traversed the matters pleaded in the 8th, 9th, and 10th pleas.

He replied *de injuria* to 12th plea, and joined issue on the 13th, 14th, and 15th pleas, and replied *de injuria* to 16th plea.

It was proved, on the trial, that a brother of the plaintiff, Harman Boyes, living in this province, having occasion to make a payment to the plaintiff, who lived somewhere in the interior of the State of Illinois in the United States, went to the defendant, who is a merchant and had been in the habit of selling exchange upon New York, to enquire how he could remit the money. The defendant told him he could sell him a draft which would be as good as any he could get in Toronto. The plaintiff's brother accordingly purchased from him the first bill, for 320 dollars. This was on the 29th of December, 1848. The bill was remitted and its receipt, by the plaintiff in Illinois, acknowledged by letter dated the 29th January, 1849.

In the month of June following, a notarial protest of this bill was sent by the plaintiff from Illinois to his brother living in this country, near Toronto, and on the 26th June, 1849, directly after its receipt, the plaintiff's brother went with the protest to defendant, who said he would send to *his partner* to enquire why it was not paid. Afterwards, the defendant said that the plaintiff had written his name wrong on the back as endorsed, and that that must have been the reason it was not accepted. The plaintiff's brother left the protest with him, taking his receipt in writing for it, in which receipt the bill was improperly called a note, and was said to have been protested for *non-payment*, and was described as drawn by C. Smead, instead of being described according to the fact as drawn by this defendant, with direction to the drawee to charge it to the account of Charles Smead.

The defendant, on this occasion, spoke of Smead as his *partner*, and said he would send to him to know why it was

not paid; and he wrote to plaintiff, on the 3rd July, 1849, telling him, if he would send back the draft not paid, he would send him the cash with all damages.

On the 6th August, the plaintiff's father, who lives in this country, near Toronto, went up to defendant with another person, who was examined as a witness on the trial, taking with them the first bill, and hoping to get from the defendant the one which they had paid him, and intending to go to one of the banks and purchase a draft to remit: but the defendant said they need not go to any bank, for that he could give them a bill as good as any they could get at a bank; he said they should not lose a shilling; that they need not be afraid; and, in order to convince them of that, he opened a drawer and shewed them that he had plenty of money. He then, on the said 6th August, 1849, drew a second bill on the same person, Dwight, adding his address in New York, and enclosed it, in presence of the witness, to the plaintiff in Illinois; and the witness immediately posted the letter. This second bill was the one declared on in the second count. It was for 344 dollars and 80 cents, which included the damages on the protested bill. The witness swore that this second bill was taken on the understanding that, if it should be paid, there would of course be no claim on the first bill, and the defendant's receipt was taken for the first bill and protest, as already stated.

On the 24th of December, 1849, the same witness, who was a brother-in-law of the plaintiff, came again to the defendant, bringing with him the second bill, which had also then been returned, protested.

That bill was drawn in the same manner as the first, by the defendant, on Dwight, in favor of plaintiff or order, with direction to charge to account of Charles Smead.

The protest of the notary in New York stated, that he had *demandé payment* on the 10th November, 1849; wherefore he did protest the said draft, and *did duly notify* the endorsers of the non-payment and protest of the same, (not saying when and how he did so).

The bill, on the back, was endorsed by payee (this plaintiff) to Stephen Wilson: there was another endorsement

on it, which had been obliterated ; and there was the appearance of there having been several other endorsements erased.

When this bill and protest were brought to defendant, on the 24th December, 1849, he said he would not pay it ; that he had already lost too much by that fellow, meaning Smead, as the witness understood.

It was found that both the protests were taken to the defendant without delay, after their receipt in this country.

The letter, in which the defendant enclosed the second bill to plaintiff in Illinois, on 6th August, 1849, was read on the trial : he says in it, " By your father's wish, I send you a draft *on our banker* at New York, with an addition of damages, &c."

It was objected for the defendant on the trial—1st, That the plaintiff had lost his remedy on the second bill, by not giving due notice of non-payment, the evidence being of presentment at New York on the 10th November, 1849, and no notice to defendant in Toronto till the 24th December following ; for that there was no legal proof, through the protest, of any earlier notice to the holder, or to any one.

2nd, That the bills were declared on as if they were inland bills—and being in fact foreign bills, the plaintiff should be non-suited for the variance.

3rd, That the plaintiff could not recover on the second bill, on account of the delay in presenting it to the drawee, from the 6th of August to the 10th of November.

The Chief Justice overruled, for the time, these objections : and the defendant called a witness, who proved that Smead was an express traveller, between this place and New York ; that Joseph, upon some understanding, or in connection with him, was, in 1848–9, in the habit of drawing bills on Dwight, in New York, receiving a commission, and Smead furnished funds to Dwight to meet his drafts ; that about the middle of October Smead failed.

The Chief Justice told the jury that the plaintiff's right of action was confined to the bills, for that if by his laches he was disabled from recovering on them, he would fail on the common counts ; that the first six pleas must be found in favor of the plaintiff, and also the eighth ; that he could

not say, upon the evidence, that the second bill was accepted in extinguishment of the first; though of course, so soon as it should be paid, it would be a satisfaction of the first bill; and that he considered the plaintiff entitled to recover on the 12th, 13th, 14th, 15th, and 16th pleas.

At the trial, a verdict was rendered for the plaintiff on the first count, and one shilling damages; and for £93 18s. 9d. on the second count; and for the defendant on 12th plea.

Eccles obtained a rule for a new trial, on the law and evidence, and for misdirection, and for the admission of improper evidence.

Cameron, Q. C., shewed cause; cases cited—13 M. & W. 445; Bayley on Bills, 1 A. & E., N. S. 43; Chitty on Bills, 177, 433-4, 566; 4 M. & W. 721; 3 Campb. 303; 2 W. Bl. 170; 7 Taunt. 179.

ROBINSON, C. J., delivered the judgment of the court.

With respect to the objection, that this bill should have been declared on as a foreign bill; and that, as it was not so declared upon, and, when produced, appeared to be drawn on a person in New York, it should have been held to be a fatal variance: we do not find that objection supported by any authority. The defendant relies on the case of *Armani v. Castrique*, 13 M. & W. 445; but all that the court there determined was, that when a bill had been so declared on as not to shew it to be a foreign bill, the defendant, who was sued as endorser, might properly assume it to be an inland bill; and, therefore, that his pleas, which denied endorsement, presentment, and notice, and in which he spoke of it as "the said inland bill of exchange," were not on that account demurrable, (as it was contended they were, because the plaintiff had not expressly called the bill an inland bill). In giving judgment in that case, the Chief Baron held that the declaration, in actions against the drawer or endorser of a foreign bill, ought to state the bill to be a foreign bill; and that, the bill in the case before them having been declared on as an inland bill, the defendant had a right so to treat it, and to call it an inland bill in his plea; and so they held that his plea was not bad for calling the bill what in the declaration

it appeared to be. That is a wholly different matter from determining, that when a plaintiff has set out a bill of exchange, truly in all that he has stated, and the defendant has denied that he made such a bill as that set out, the plaintiff must be held to have failed in proving the instrument, because he has not inserted the place where it was made ; that place, too, not being in a foreign country, but within our own jurisdiction, and no place being now necessary to be stated for the purpose of venue. Before we add to the number of technical objections which are allowed to embarrass the administration of justice, we must be shewn some authority which goes to the point. We cannot take the case cited as going by any means the necessary length. And Mr. Chitty's authority, who was himself an eminent pleader, as well as a learned compiler, is against it ; for he tells us, in his note to his precedent of a declaration on a foreign bill, page 127, note (1), that the place where the bill was made need only be inserted when the bill was drawn abroad. The bill now in question was drawn here, and presentment and protest are averred, so that the only reason for requiring the foreign character of the bill to be apparent, in order that it may be seen whether it did not require to be protested, is, in this case, immaterial. Mr. Chitty, in his treatise on bills (566), advises that the direction to the drawee should in general be omitted, for fear of a variance. Then, if it can be safely omitted in any case, as it usually is, in fact, it is impossible to hold that it forms a part of the bill, so that the omitting it is a misdescription, and occasions a fatal variance. If it were so, then the omitting, in the declaration, the street and number, which may happen to be given as the residence of the drawee, would be equally fatal in regard to inland bills ; for we are not to notice, judicially, that New York is a foreign country. The courts in England have refused to notice, judicially, that Dublin was not in England. If in any case of a bill which is in fact a foreign bill the declaration has not been so framed as to shew it to be such, and the want of protest would form a good defence, the fact that it was a foreign bill could be pleaded as the foundation of the defence, and

the party would not be concluded by the declaration not exhibiting the fact. For these reasons, we do not hold that the plaintiff has not, in this case, proved such a bill as he declared upon, because he omitted to call the bill a foreign bill, or to state that the bill was directed to the drawee in New York; and that New York was in a foreign country. If, in the thousands of cases that have occurred, such an omission has ever been held to occasion a fatal variance, surely some trace would be found of a decision to that effect. The case of *Houriet v. Morris*, 3 Camp. 303, is in principle against the objection.

With regard to the other points raised at the trial upon the presentment and notice, this case is certainly one in which the holder of the bill, who is now suing the drawer, is entitled to the full benefit of every rule or exception which we can make in his favor. It would be peculiarly hard and unjust if his remedy were allowed to be defeated by a too rigorous application of any supposed rule of law in regard to commercial securities. What is this case? A farmer, who has removed to this province from Illinois, a country very remote from us, in the interior of the United States, has a payment to make in that country, and learning that the defendant is a person much engaged in commercial transactions with the United States, goes to him to enquire how he could best remit the money. The defendant, instead of directing him to any of the banks, where he could readily have got a good bill on New York, at the current rate of exchange, recommends him to purchase a bill from himself on New York, telling him that it would be as good as any bill he could get at a bank. The plaintiff does buy a bill from him, and sends it to Illinois in December, which comes back from Illinois in June following, protested.

The defendant expresses surprise at its not being paid, and says he will enquire how it happened; that there must have been some blundering in the matter; and after allowing ample time for enquiry, the plaintiff goes again to him, anxious to get the amount of the bill from him, in order that he may go to a bank and purchase a good bill, and make his remittance; but the defendant tells him there is

no occasion for his going to any bank, that he shall not lose a shilling by him ; that he will give him a bill as good as he can get anywhere, and at last prevails on him to take another bill from him on New York. This is given to the plaintiff in August, 1849 ; is sent, like the other, to Illinois, and comes back protested, in December following. It comes back after a less interval than the first did ; the defendant, on the former occasion, did not seek to avoid liability on any ground of the bill not being presented soon enough, or his not having received notice as early as he might ; but he replaces the protested bill with another ; and now, when the second bill is returned, with somewhat more promptness, to him, protested, instead of returning the plaintiff his money, he objects that he has lost all remedy, because this second bill was not sooner presented at New York, and because when it was presented and refused payment, prompt enough notice of the default was not given to him. This does not seem reasonable.

At the trial, I thought the jury might well take such a view of the case, upon the evidence, as would allow the plaintiff to recover, and it is satisfactory to me to find that my brothers have the same opinion, and I believe, I may say, with less hesitation than I expressed at the trial. The more I have considered the case the more I am convinced that the verdict is proper, and ought not to be set aside.

Considering the case as upon the second bill, the first point is upon the length of time which elapsed before that bill found its way to New York and was presented there. It was drawn in Toronto on the 6th August, 1849, payable at sight, in favor of a party living in the State of Illinois, to be sent there as a remittance, and was presented in New York on the 10th November following, that is, after an interval of three months and a little more. It was a negotiable bill, intended to be used in Illinois as a payment of an instalment due there for land. The moment the payee paid it out in Illinois, he put it in circulation, and then it was beyond his control. It might pass from hand to hand in the course of discounts or traffic, and be made, in that great inland commercial country, the medium of a number

of transactions. It is evident, from the inspection of the bill, that it had passed through many hands; and the probability was, that it might be circulating from one town to another, in the course of mercantile dealing, for a considerable time before it would find its way to New York.

The case of *Muilman v. D. Eguino*, 2 H. Bl. 565, fully supports this case against the objection I am now discussing; for there Buller, J. said, that if a bill of this kind were put in circulation, and were kept out for a year, he could not say there would be laches. In *Goupy v. Harden*, 7 Taunton 159, a bill, payable 30 days after sight, drawn early in May in London, upon Lisbon, being sent to Genoa, was not presented till the 22nd of August, before which time the drawee had failed, and on that account it was not accepted. The delay in presenting it was objected to; but Gibbs, C. J., thought "the plaintiff had not taken the risk upon himself by sending the bill into circulation;" the jury said, "such a bill might be sent round the world before it was presented for acceptance," and they found for the plaintiff. This was a delay greater than in the present case, and the distance much less. The case of *Straker v. Graham*, 4 M. & W. 721, has been cited as an authority the other way, where the court refused to set aside a verdict found for the defendant, on the ground that the delay of three months in presenting a bill drawn in Newfoundland, on England, constituted laches, as the jury thought. But that was a bill not intended to be put in circulation at any intermediate place, nor at all likely to be. It was simply, therefore, kept back for a considerable time without any apparent reason. This bill, on the other hand, was remitted to a place 1500 miles distant from New York, to be there made use of as payment, by which act it would be put at once into circulation, and no longer under the plaintiff's control. Besides, in that case of *Straker v. Graham*, the judge did not instruct the jury that there had been an unreasonable delay, but, on the contrary, recommended a verdict for the plaintiff; the jury, however, after being out twenty-four hours, drew lots for their verdict, and the defendant, it seems, won it. The court declined to grant a new trial, not because they fully

approved the finding, but because they were unwilling to give any countenance to an application for a new trial, attempted to be supported by an affidavit of some of the jurymen, of their own misconduct. The case cannot be looked upon as a satisfactory authority on the legal question; and one's confidence in the accuracy of the report is a good deal shaken, when we find it stated repeatedly in the case, and without any doubt or hesitation, that there is a regular post office packet, between St. Johns and England, three times a week.

But there are two considerations applying to the case now before us, which make strongly in favor of the plaintiff, on this first objection. One is, that this was not a bill to which the defendant became a party in consequence of some individual mercantile transaction. He dealt in bills upon New York as a sort of commodity, and may, therefore, be reasonably understood as engaging to provide funds there at all times, to meet the liabilities which he was assuming in thus accommodating people who applied to him for funds at New York. Mr. Justice Bayley, in his treatise on bills, lays great stress on this distinction, as bearing upon the question of laches in not presenting a bill, drawn payable at or after sight, promptly for acceptance. "Upon a bill or note," he says, "payable on demand or at sight, and given for cash, by a person who makes the profit by the money on such bills or notes a source of his livelihood, it is difficult to say what length of time such person shall be entitled to consider unreasonable."—4th edition, 189.

The other circumstance I alluded to is, that the defendant in this case seems to have afforded strong evidence that he ought not to consider the delay between the 6th of August and 10th of November unreasonable in such a case; for the first bill, drawn on 29th December, 1848, for the same purpose, did not find its way to New York till the 31st May, which was an interval longer, by two months, than occurred in respect to the last bill; and yet when it came back, protested, to the defendant, on the 26th June, he gave the holder another bill for the amount, including charges, and assured him he should lose nothing by his

disappointment. The case, we think, is clear of difficulty in this objection of delay in presentment.

With regard to the other objection,—the not giving due notice :—The defendant's counsel seemed to consider that it was a necessary part of this plaintiff's case, to shew notice given from each endorser to the other, within the regular period, in order to make it apparent that there had been no laches anywhere ; but if that were so, then it might be necessary, in the case of such a bill as this, to begin by issuing half-a-dozen commissions, to examine witnesses, into different states of the union, in order to shew what was done, as regards notice, by each endorser.

A man would do better, in that case, to carry his money to Illinois and make his payment than to send a New York bill there, if he must begin by incurring an expense larger, perhaps, than the amount of the bill, in his attempts to trace its history after he put it out of his hands. Where questions have arisen upon laches, in giving notice from and to intermediate parties, it is evident that the fact of laches, as to some certain party, has been ascertained. The burthen of tracing the bill back through the several endorsers, is not undertaken by the holder in the first instance. He shews due notice to the party against whom he is proceeding, and what is to be considered due notice must be determined in a view of all the circumstances.

We find but few cases indeed, in England, in which questions have arisen upon the requisite notice of non-payment of foreign bills ; the reason of which may be, that in general the parties to such bills are merchants of established character, who would not, without fair reason, raise any such question ; for Mr. Chitty tells us expressly, "that it is not the practice, among respectable houses, to take advantage of a slight omission or irregularity in giving notice of dishonor, except where an actual loss or injury has arisen from the neglect."

In the case before us, the defendant, the drawer of the bill, gets notice from the holder, through his agent in this country, of the bill being unpaid, by the latter calling upon him with the bill, on the 24th of December, 1849 ; the bill

having been presented in New York on the 10th of November. There is no reason to suppose that the holder, living in Illinois, delayed using it as soon as he received it, or that his agent here did not at once call on the defendant when the bill came back to him.

The first bill appears to have taken from the 31st of May to 26th of June to travel up to Illinois and from thence to Toronto; and the defendant, on that occasion, did not treat the delay as affording any evidence of laches, but admitted his liability and gave another bill. This second bill being protested in New York on 10th November, was returned to Illinois, and came from thence to the defendant in Toronto on the 24th December, having been eighteen days longer on the road; which would, perhaps, in the opinion of persons acquainted with the route, be sufficiently accounted for by the difference of the seasons; considering that the payee lived in the interior of the state of Illinois; that the roads must then have been in a very indifferent state; and that the rapid communication by the way of the lakes and rivers, in steamers, must then have been closed for the season; and, besides, there may have been various circumstances, arising from the number of intermediate parties, which, if explained, would account for the delay.

The relation in which the defendant stood with respect to this bill, also makes it a transaction out of the common course. He was, in fact, drawing on himself, not on any third party. It is evident, from the testimony on the trial, that he relied on Smead furnishing funds to meet the bill, by an arrangement between them; he spoke of Smead as his partner; in his receipt given to the plaintiff's brother, the defendant speaks of the bill as if drawn by Smead, which, I dare say, was the real nature of the transaction, in effect, as known to himself, though it was his name that happened to be subscribed to the bill, and not Smead's. It was plain, from the defendant's admission, that they were identical in interest as regarded this bill transaction, upon some understanding between them to divide the commission for drawing.

Dwight, on whom the bill was drawn, was not substan-

tially the drawee; he was not the person expected to find funds; the failure to pay is not pretended to have arisen from any change in his circumstances; he was only an agent. And when the second bill was brought to the defendant, protested, the reason he gave for not paying was, not that he had suffered for want of notice of Dwight's non-payment, but that he had already lost enough by Mr. Smead, and would pay no more. Under such circumstances, we think it reasonable to hold, that Dwight's place of business was nothing but the place in New York where the defendant engaged to have funds of his own to meet the bill; not that he was drawing upon Dwight as a debtor to him in that or any other amount; and that the moment the bill came there, and Mr. Dwight, the agent of the defendant and Smead, had no funds to meet it—and this from Smead's fault, not from Dwight's—the knowledge of nonpayment which Dwight had, and which Smead had, was, under such circumstances, notice to the defendant, according to the principle of the decision in *Smith v. Thatcher*, 4 B. & Al. 200, and *Porthouse v. Parker*, 1 Campb. 82.

And it is to be considered also, that when the defendant was required to pay the second bill, on its being returned protested, he did not refuse on any ground of want of due notice; all he complained of was Smead's misconduct, who, in this transaction, stood in the same footing as himself in that respect.

Wilkins v. Jadis, 1 Mov. & Hob. 43, is an authority to shew that the jury were warranted in considering that notice had been duly given, since the defendant placed his refusal to pay on ground that had nothing to do with notice, or with the solvency of Dwight, who was only nominally the drawee. We think, therefore, that the plaintiff was properly allowed to recover for the amount of the second bill, which of course is all that he claims, &c.

The count on the first bill becomes immaterial to be considered. If we could only hold the plaintiff entitled to recover on the ground that notice was dispensed with, then the pleadings on the record would not suit the case, and it would have been for the court to consider whether, to pre-

vent great injustice, they might not grant a new trial, on payment of costs, allowing the plaintiff to amend his declaration; but, according to what has been held in similar cases, we consider that there is ground for holding that the defendant had notice promptly of nonpayment, through his agent in New York; and that his conduct, when payment was demanded, might be taken as an admission of notice, or as waiver of any objection for want of it: and further, that, looking at all the circumstances, we cannot rule that the defendant did not receive notice in reasonable time, when he got it on 24th December, considering that the bill had to be returned from New York to Illinois, and to come from thence here, by the ordinary course of the post, with the delays likely to occur at that season in travelling so great a distance. No actual neglect was shewn, and we think none was fairly to be presumed under the circumstances of the case.

Per Cur.—Rule discharged.

DOE DEM. KEELER V. COLLINS.

Construction of will, as to creation of an estate for life or in fee.

Held per Cur.—That a devise to the testator's wife, of land, "to be at her will and disposal during her life," with a subsequent direction, in the will, as to what should become of the estate after the wife's decease, gave the widow only an estate for life, and not an estate in fee.

The sole question in this case was, what estate Lois Hurd took under the will of Jehiel Hurd.

A verdict had been taken for the plaintiff, subject to the opinion of the court upon that point.

The words of the will, as applicable to the question, were, "after all my just and lawful debts are paid, I give and bequeath to my beloved wife Lois the whole of my landed estate and personal property, to be at her *will and disposal during her natural life*; and after my wife's decease," &c., to other parties.

Richards for the plaintiff. *Geo. Sherwood* for the defendant. Case cited—*Doe Thomas v. Humberstone*, 3 U. C. R. (O. S.) 516.

ROBINSON, C. J. delivered the judgment of the court.

The defendant endeavors to make title under a convey-

ance of the fee from Lois Hurd, the widow of the testator, Jehiel Hurd, she being now dead. The question is, whether Lois Hurd took a fee by this will. It is clear, we think, that she did not. The will is badly drawn; but the intention is clear to give her only an estate for life in this land, or in any of the devisor's land.

The case of Doe dem. Thomas v. Humberstone, in this court, U. C. Rep. (O. S.) 3 vol. 516, was relied upon by the defendant for supporting this devise to Lois Hurd as a devise in fee; but first, there is a material difference in the language of the two wills; that will being "to be *her's* during *her* natural life, to be at her full and free disposal to whom and whomsoever she pleases; out of which it is my will that all my just debts shall be paid." And this will being "*to be at her will and disposal during her life.*" And then this will proceeds to direct *what shall* become of the estate after her death; which can leave *no doubt* whatever remaining that the devisor intended her to take only an estate for life.

Per Cur.—Postea to plaintiff.

HASTINGS V. EARNEST.

Appeal from court below on question of practice, refused.

This court will not entertain an appeal from the court below, upon the question of practice, whether the plaintiff or defendant was entitled first to address the jury.

Appeal from the County of York County Court.

Assumpsit on a promissory note for 15*l.*, made by the defendant, payable to the plaintiff.

Pleas—non-assumpsit. 2nd, Accord and satisfaction by delivery of goods.

3rd. Set off. Verdict for plaintiff—15*l.* 13*s.* 6*d.*

A new trial was moved for on the ground that the verdict was against the weight of evidence; also on the ground of surprise, absence of witnesses, misdirection, that the defendant was entitled to begin at the trial; and generally on affidavits. This rule was discharged, and the judgment was appealed from. The evidence, on the trial, was contradictory, and the affidavits were equally conflicting. The

jury, according as they believed or disbelieved the witnesses on one side or the other, might properly have given their verdict for the plaintiff or the defendant.

The question of fact was, whether the note had been settled for and satisfied by property turned out to plaintiff, and so ought to have been given up, and not sued upon; or, whether the satisfaction was not confined to other notes which the plaintiff had held against the defendant, and which it is admitted were so satisfied. It was denied, by the plaintiff, that this note was ever in any manner satisfied; and he insisted that this was a dishonest attempt of defendant to make it appear, contrary to the truth, that this note was included in a settlement which had really nothing to do with it. The judge left that question to be dealt with by the jury.

ROBINSON, C. J., delivered the judgment of the court.

Whether the learned judge formed a different opinion, upon the evidence, from that which the jury expressed by their verdict, does not appear; but, in the exercise of his discretion, he declined to grant a new trial. He was a better judge of the facts, having heard the testimony given, than we can be; and if we doubted whether he exercised his discretion properly, we should not overrule his decision.

There is no legal question involved, for we do not treat as such the question of practice, whether plaintiff or defendant was entitled first to address the jury.

We hope it will never be imagined that we shall entertain an appeal on that ground.

Per Cur.—Judgment below affirmed: Appeal dismissed with costs.

BANK OF B. N. AMERICA V. AINLEY.

Demurrer—issues in fact—costs.

When, upon a demurrer and issues in fact, judgment is given in favor of the defendant on the demurrer, and the issues in fact are found for the plaintiff, the defendant cannot call upon the plaintiff to pay to him the costs of the trial of the issues, on which he failed, as a condition of his (the plaintiff's) being allowed to amend on the demurrer.

Where separate actions were brought against the maker and endorsers of a note, and upon a demurrer by the defendant to the plaintiff's replication, judgment was given for the defendant, and the plaintiff applied to amend, making but one application in the three cases: *Held per Cur.*—that the defendant was only entitled to the costs, as for one case, in attending to oppose the application to

amend. *Held also*—that as to the ordinary fee disbursed to counsel, with brief to argue the demurrer in the *three* cases, and the ordinary taxable costs occasioned to the defendant by the demurrer in *each* case—that they might be allowed to the defendant.

Mr. *Hagarty* obtained a rule to shew cause why the order of the Honorable the Chief Justice of the Common Pleas for revision of taxation of costs in the above causes, and for paying over to the plaintiffs or their attorney the amounts struck off and disallowed on such revision, should not be rescinded.

There were three actions brought against Richard Ainley as maker, and against John Ainley senior, and John Ainley junior, severally, as endorsers of the same two promissory notes. Each defendant pleaded several pleas in the respective actions—their defences being conducted by the same attorney. The pleas in all were the same.

To one of the pleas (the same in each action) the plaintiff filed a replication, which the defendant demurred to. Upon the other pleas in each action issues of fact were joined.

The demurrers came on to be argued on separate demurrer books, and separate notices of appointment for argument; but the plea, replication, and demurrer, being the same in each, and bringing up exactly the same point, and the same counsel being employed in each of the cases, there was but one argument; and the cases were disposed of by the court in one judgment, which was given for the defendants on the demurrer.

The plaintiffs had in the meantime taken down the cases to trial; and had succeeded in all the issues.

Applications were made afterwards by the plaintiffs to amend; which has, in this court, been sometimes allowed after contingent damages has been assessed; and, on the 20th September, 1849, leave was granted by Mr. Justice Sullivan, on condition of paying costs.

Upon taxation, (which was attended by the plaintiff's attorney, or his agent,) the same costs were taxed in each of the three causes—viz., 96*l.* 6*s.*—though it was strongly objected to. In each case the master taxed 10*s.* revision fee, for pleadings. There were the same charges for in-

structions for brief, brief, and fee on brief for trial. Also, there were the same charges for demurrer books and attendances in each case: and also for instructions for brief for argument of demurrer—for the brief, attendance, and fee on argument—so also as to attending for judgment, and term fees.

A revision of taxation was applied for, in November, by the plaintiffs' counsel; and on the 17th of December, 1849, Mr. Justice Macaulay made an order for revision, directing that the costs of the day, allowed to the defendants in each case, be struck off, and that the allowance for briefs and fees to defendant's counsel on argument of the demurrers, and the fees allowed to the agent of defendant's attorney upon opposing the application to amend, after the argument of demurrer, be reduced *two thirds*, or be apportioned so that there be taxed against the plaintiffs only one brief and fee to counsel on the argument of the demurrers, and one fee for attending and opposing the plaintiffs' application to amend.

And it was further ordered, that the defendant's attorney should, on or before the fourth day of the next term, pay over to the plaintiffs or their attorney the amount which should be struck off on such revision.

It was this order which the court was asked to rescind, as being unreasonable and contrary to the practice of the court.

Richards shewed cause. Case cited—2 Dowl. 274.

ROBINSON, C. J. delivered the judgment of the court.

It certainly is but reasonable, that, where the pleadings in each action and the *point* which they presented were so perfectly identical, and the three suits being all, as they were, upon the same notes, and the conducting of them on both sides, respectively, in the hands of the same counsel and attorney, the plaintiff should not be charged with expenses of all kinds as fully as if they were separate suits, on different causes of action, presenting different questions, and in the hands of different attorneys.

Charges for attendances and for indispensable steps which must be taken equally in each cause, however con-

nected they were in regard to their subject matter, it must be right to allow; because the same services of that kind must be rendered in each case: but charges for revising and settling, for briefs and instructions, and for arguments of demurrers which either never took place or must have been unnecessary, and for anything, in short, which required the mind to be exercised, stand on different ground in reason, though they may not do so according to ordinary practice.

When one of these pleas, replications, or demurrers, had been revised and settled, for the purpose of one of these causes, the service was in effect rendered for all, for no different opinion could be formed or conclusion come to. The one must unavoidably govern the other, and all were in the hands of the same attorney and counsel. And so also in regard to the argument, only one case was, in fact, argued; but one argument would have been heard; it would have been absurd to have desired or expected otherwise.

Then, as to the application to amend, and the affidavits and proceedings charged for in consequence of it: *Pitt v. Evans*, 2 Dowl. 226, seems to warrant the assumption, that by one application supported by one affidavit entitled in the three causes, the same object could have been attained as by adopting a completely independent line of proceeding in each. However that may, in any such case, depend upon the manner in which the other side shapes his proceedings; for he could not complain of being met in the same form in which he makes his motion. Here it appears that the plaintiff made but one application in the three cases.

There is but little to be met with in the books of practice that can guide us in disposing of this application; but upon examination of what is to be found, we decline setting aside wholly the order made in December: for we hold that clearly the costs of the defendant upon the trial of the issues, in all of which the defendant failed, are not costs which the plaintiff can be made to pay to him as a condition of amending on the demurrer, (2 Dowl. 274,) and we agree

with the learned judge as to that part of the order which relates to the costs of opposing the application to amend.

But as to the ordinary fee disbursed to counsel with brief to argue the demurrer, and the ordinary taxable costs occasioned to defendant by the demurrer, we think we cannot, on any clear ground, determine that they should not be allowed in each case.

We rescind, therefore, only so much of the order in chambers as gives direction in regard to these costs: for, whatever may be the reason of the thing, we apprehend the practice gives a claim to these costs.

Per Cur.—A portion of the order in chambers rescinded.

FARRISH V. SHIELDS.

Notice of writ of enquiry—Service, when waived by defendant's appearance at trial by attorney.

Where the defendant is represented at the trial, and has made his defence, the court will not set aside the proceedings on the ground that no notice of the execution of the writ of enquiry had been given to the defendant.

In this case, a rule nisi was granted on motion of Mr. Phillpotts to set aside proceedings, with or without costs, on the ground that no notice was given to defendant of the execution of the writ of enquiry.

It was shewn on the plaintiff's side, that at the trial, an attorney of this court, Mr. McKenzie, appeared for the defendant and addressed the jury in mitigation of damages, and objected to a small portion of the account for which the action was brought.

It was shewn also, that the defendant had put in special bail by G. M. Crysler as his attorney, and that Mr. Crysler having left the district before the time for giving notice came, and the plaintiff's attorney not being able to find to what place he had removed, affixed a copy of the notice in the office of the deputy clerk of the crown of the county in which the venue was laid, and in which Mr. Crysler had lately resided.

ROBINSON, C. J., delivered the judgment of the court.

We must discharge this rule, as the defendant was represented at the trial and made his defence. We are not to presume that the gentleman who appeared for him did so

without his authority; and from his appearing and conducting the defence, the inference arises that the notice of enquiry had come to his knowledge.

Per Cur.—Rule discharged.

DODGE V. MUIR.

Special and common counts—general verdict—special count bad—Venire de novo.

Where there is a special count and common counts in the declaration, the effect of the special count being bad, where special damages have been assessed, is that there must be a "*venire de novo*," unless it can be said that the verdict was given wholly upon evidence applicable to the common counts alone, and not to the special count.

Assumpsit on a special agreement to build the frame of a mill for defendant.

The first count was special on the agreement.

There were also common counts for work and labor, and materials found and on an account stated.

Pleas: 1. Non assumpsit. 2. Set off. 3. Performance. 4. Denial of the performance by plaintiff of his part of the agreement.

Verdict for plaintiff, 50*l*.

The plaintiff moved by *J. H. Cameron*, Q. C., to arrest the judgment, or for a *venire de novo*, on the ground briefly stated below by the court. *Weller* shewed cause, and cited 18 Law Jl. Exch. 23; 4 U. C. R. 361; 2. U. C. R. 320.

ROBINSON C, J, delivered the judgment of the court.

The special count on the agreement is clearly bad, for by the agreement the plaintiff engaged to build a wheel house thirty feet by twelve feet, of a sufficient height. And in his declaration, after setting out his contract truly, he averred that he erected a wheel house "*of greater size and dimensions than that specified in the said agreement*—to wit, of the size of twenty feet one way by forty feet the other way," thereby entitling himself to sue on the agreement by averring the performance of something different from what he undertook to perform; and as the defendant bound himself to find materials for the building, the difference is the more important, because the failure to find materials may in such a case have arisen from the very deviation in question.

Then the effect of the first count being bad, where general damages have been assessed, as in this case, seems to be that there must be a *venire de novo*, and we must so dispose of this case. The plaintiff contends that he might be allowed to remove the ground of objection by applying the verdict to the common counts only; but that could not be done in a case like the present, even if a proper application had been made to the judge who tried the cause; because it could not be said that the verdict was given wholly upon evidence applicable to the common counts alone, and not to the special count. On the contrary, after hearing evidence from several witnesses of omission on the part of the defendant to find materials, and of the defective quality of some materials furnished, and of the plaintiff's being obliged to do several things which the defendant had bound himself to do—all intended to support items of claim against the defendant for damages upon breaches of the agreement expressly assigned in the special count—the jury gave a general verdict for 55*l*.

It may be that the plaintiff did give evidence upon the trial to support damages under the common counts alone, which would have warranted as large a verdict in the defendant's favor as was given, leaving out of view all such other claims as I have mentioned; but we cannot say upon any certain ground that the verdict does not embrace allowances which could only have been made under the special agreement.

Per Cur.—Venire de novo awarded.

MCKENZIE V. GIBSON.

As to costs of remanet abiding the event.

Where judgment was given for plaintiff on demurrer to defendant's pleas, with leave to defendant to amend his pleas on payment of costs, which costs were to include the costs of the day for the last assizes, the case having been made a remanet, the court, on discovering that the defendant had a cross action against the plaintiff at the same assizes (of which they were not aware at the time they gave their former judgment), and that the causes had by consent of both parties been made remanets, allowed the amendment to be made on payment of the costs of the demurrer; and, *semble*, that at any rate this would have been the proper course.

In this case, the court gave judgment for the plaintiff on demurrer to the defendant's pleas, but allowed the defen-

dant to amend on paying costs, which they said should include the costs of the day for the last assizes, the cause having been made a remanet, and as the court supposed, from the parties not being there to try it.

The court was now asked to reconsider the rule so far as regarded the costs of the remanet, upon a statement of facts agreed to by both parties. It seemed that there was a cross action by the defendant against the plaintiff, of which the court was not aware, standing for trial at the same assizes; and that both parties being doubtful whether they could be prepared with their witnesses, the two causes were made remanets by mutual consent.

ROBINSON, C. J., delivered the judgment of the court.

Under these circumstances, we allow the amendment to be made on payment of the costs occasioned by the demurrer; and at any rate that, I am inclined to think, would have been the more proper course. I refer to *Waller v. Blacklock et al.* (15 L. J. Exch. 333; 1 D. & L. 964), which shews that the costs of the remanet should remain to be taxed according to the event under the circumstances.

We cannot tell but that the plaintiff, if the cause had gone to the jury, might have failed to prove his case on the general issue.

Per Cur.—Amendment allowed.

PATTERSON V. PRINCE.

In trespass for mesne profits, before the verdict was taken, the plaintiff's attorney and defendant signed a paper, by which it was agreed, "that *in case* a verdict shall be given for the plaintiff, the costs in the suit shall be left to be taxed by, &c., and the value of the mesne profits shall be decided by," &c.: The court held that the words "in case a verdict shall be given for plaintiff," did not preclude defendant from contending against a verdict at the trial upon any ground he might have in law or upon the merits.

Trespass for mesne profits.

At the trial, a verdict was by consent given for the plaintiff for 20*l.* damages, subject to be increased or diminished by the award of Mr. Vidal as to the amount of costs in the action of ejectment, and by the award of Duncan Grant, Esq., as to the amount of mesne profits, for six years.

Before this verdict was taken, the plaintiff's attorney and the defendant signed a writing, by which it was agreed "that the costs in the ejectment suit should be left to be taxed by Mr. Vidal, and that the mesne profits should be left to be decided as to their value for the last six years, to Duncan Grant, Esq., *in case a verdict shall be given for the plaintiff.*"

This last line was added in the handwriting of Mr. Prince, the defendant. The parties disagreed as to the effect of it. The learned judge at the trial thought that if a verdict was given for the plaintiff on the point of title, the defendant must be held liable on this writing for mesne profits and costs—that is, that he could not dispute his liability on any other ground.

The defendant insisted that the writing did not preclude him from contending against a verdict for the plaintiff on other grounds besides the mere questions of plaintiff's title to the premises and defendant's occupation; and it was contended that if it were open to him to resist a recovery on any other ground, this verdict should be set aside, because in other actions between the plaintiff and other defendants, it was made out to the satisfaction of the jury that there were not grounds for claiming substantial damages.

ROBINSON, C. J., delivered the judgment of the court.

We think there should be a new trial without costs; for it is evident by the defendant's attorney having insisted on the insertion of the words which were added to the consent as drawn by the plaintiff's attorney, that the former was careful to protect his client by a stipulation which he thought important; and we have only to say what is the fair meaning of that stipulation, and to give the defendant the benefit of it accordingly.

"In case a verdict shall be given for the plaintiff," certainly leaves it fairly open to the defendant to contend against a verdict at the trial upon any ground that he may have in law, or upon the merits. And from what passed in one or more actions for mesne profits, following ejectments against other defendants brought by the present lessor

of the plaintiff upon the same title, we know that it may have been in the power of this defendant to set up as a defence upon the merits certain facts which, according to the weight given to them by the jury, might properly have the effect of precluding the plaintiff's recovery, at least for anything beyond nominal damages, and perhaps of entitling the defendant to a verdict in his favor.

Per Cur.—New trial without costs.

LE MESURIER ET AL. V. SHERWOOD.

Necessity of averment of notice in declaration to defendant—Argumentative and immaterial pleas.

Where A., in consideration of B.'s advancing money to C., guaranteed that B.'s acceptance of C.'s drafts should be covered by consignments of flour, together with commission: *Held, per Cur.*, that it was not necessary to give notice to A. of the non payment by C. of the drafts, as they respectively became due—A.'s not having guaranteed *the bills*, but that the acceptances would be covered. The defendant A. pleaded in his 5th plea—that before the maturity of the drafts, which amounted in all to 1500*l.*, the plaintiffs *did receive* from Cummings *to cover the same*, sending large quantities of flour, amounting in the whole to 990 barrels, and did sell the same for a large sum—namely, 1657*l.* 5*s.* 9*d.*—and *much more than sufficient* to cover the amount of the said drafts so accepted, &c., and the said commission in the declaration mentioned." *Held, per Cur.*—on demurrer to plea—plea bad, in not averring *directly* that the plaintiff B.'s advances *were covered*, together with commission; and also, in tendering an immaterial issue, in pleading that flour was received *much more than sufficient to cover, &c.*

Declaration—Assumpsit: For that whereas heretofore and before the making of the defendant's promise herein-after mentioned—to wit, on the 29th of September, A. D. 1845—one George W. Cummings proposed to consign to the plaintiff for sale from 1500 to 2000 barrels of fine flour, manufactured at the Dover Mills, of which flour the said George W. Cummings did then expect to have 1500 barrels ready for delivery during the month of October, A. D. 1845, aforesaid, and the remainder early in the ensuing month of November, upon the terms of his, the said G. W. Cummings' receiving from the plaintiffs acceptances of the plaintiffs, at such dates as the banks would discount—to wit, at three months after date, as and for advances in respect of the said flour to the amount of 1500*l.* for 1500 barrels, warranted to be forwarded to the plaintiffs, and further advances at the like rate of one pound per barrel, for such further quantities as the said George W. Cummings would warrant to forward thereafter; and the said George W.

Cummings did then offer to procure for the plaintiffs the guarantee of the defendant for the amount of the drafts proposed to be drawn by the said George W. Cummings upon the plaintiffs, as and for such advances as aforesaid ; and the plaintiffs being willing to accept the proposition of the said George W. Cummings upon the terms of receiving a commission upon the sale of the said flour, of five per cent., including guarantee thereupon heretofore—to wit, on the day and year last aforesaid, the defendant, in consideration that the plaintiffs, at the request of the defendant, would make such advances so required by the said George W. Cummings as aforesaid, did then, to wit, on the day and year last aforesaid, *promise and guarantee* to the plaintiffs, *that the advances in the said proposal* stipulated for by the said George W. Cummings, which the plaintiffs might make to the said George W. Cummings for that fall's transactions, to wit, the fall of the year last aforesaid, to the extent of 2000*l.*, or such sums as might be accepted for under that *sum—should be covered by flour, together with the commission, or repaid in cash on maturity of the drafts.*

And the plaintiffs say that they, confiding in the said promise and guarantee of the defendant, did afterwards—to wit, on the day and year last aforesaid, and on divers other days and times during the fall of the year last aforesaid, being the fall so limited by the defendant as aforesaid, accept divers drafts of the said George W. Cummings, drawn upon the plaintiffs, payable at such dates as the banks would discount, to wit, at three months after the dates thereof respectively, as and for such advances so stipulated for as aforesaid, and being for the transactions of that fall, amounting in the whole to a large sum of money ; not exceeding the sum of 2000*l.*, to wit, to the sum of 1500*l.* ; and the plaintiffs say that although the said drafts have long since, and long before the commencement of this suit, become due and payable, and although the plaintiffs at the maturity thereof did pay to the several holders thereof the several amounts thereof in full respectively, yet the said George W. Cummings did not at the maturity of the said drafts, or at any time before or thereafter, although often requested

by the plaintiffs so to do, cover the said drafts, or any part thereof, by flour, together with five per cent. commission upon the sale thereof, including guarantee, or repay the amount of the said drafts to the plaintiffs in cash, but wholly neglected and refused so to do; of all which the defendant afterwards, and before the commencement of this suit, to wit, on the 1st of May, A. D. 1845, had due notice, yet the defendant not regarding his said promise and guarantee, hath not as yet paid to the plaintiffs the amount of the said advances or any part thereof, although he, the defendant, was afterwards, to wit, on the day and year last aforesaid, duly requested by the plaintiffs so to do, but hath wholly neglected and refused, and still neglects and refuses so to do, and the said advances still remain wholly uncovered by flour as aforesaid, and unpaid to the plaintiffs, &c.

Plea 5th. And for a further plea, the defendant saith that after the making of the said guarantee, and after the plaintiffs had accepted the said drafts in the said declaration mentioned, as and for such advances as therein mentioned to the amount, to wit, of 1500*l.*, and before the maturity of the said drafts, to wit, on the 1st day of December, A. D. 1845, the plaintiffs did receive from the said George W. Cummings, to cover the same, sundry large quantities of flour, amounting in the whole to 990 barrels of flour, and did sell the same at sundry prices, amounting in the whole to a large sum of money, to wit, the sum of 1657*l.* 5*s.* 9*d.*, *and much more than sufficient to cover the amount of the said drafts* so accepted as aforesaid, and the said commission in the said first count of the said declaration mentioned: And this the defendant is ready to verify, &c.

Demurrer to 5th plea. 1st. Because the said 5th plea contained an argumentative traverse of the allegation in the said first count contained, that the said George W. Cummings did not cover by flour the said drafts at the maturity thereof, or at any time before, and also of the allegation that the said advances still remain uncovered by flour and unpaid to the plaintiffs, and tended to great and unnecessary prolixity in pleading. 2nd. Because the defendant in the said 5th plea ought to have concluded by

putting himself upon the country, or with a formal and special traverse of one or other of the said allegations. 3rd. Because the said fifth plea neither confessed and avoided the material averment in the said declaration that it assumed to answer—namely, that the said George W. Cummings did not cover the said drafts—nor did it traverse the same. 4th. Because the issue tendered by the said fifth plea was too large, and included more than was necessary for the defendant's defence, and for that no single material issue could be taken upon the said fifth plea, nor any certain issue. 5th. Because the said 5th plea was also uncertain and argumentative in this, that it did not distinctly aver that the amount of the said drafts and advances were covered by the said flour in the said 5th plea mentioned, or the produce of the said alleged sale, but left it to be inferred from the alleged fact that the said produce was more than sufficient to cover the amount of the said drafts and commission, without averring that the whole of the said produce was applicable to that purpose. 6th. Because it was not alleged at what time the said sale took place, although the averment of the said sale is material. 7th. Because the said fifth plea was insufficient and uncertain in this, that all the facts therein alleged might be true, and yet a large part of the said advances still remained uncovered and unsatisfied to the plaintiffs. 8th. Because the said fifth plea tendering either an immaterial issue upon the exact amount of the flour alleged to have been received by the plaintiffs, or seeking to compel the plaintiffs to admit the receipt of a precise quantity, it tendered an immaterial issue upon the gross amount of the said alleged sale being more than sufficient to cover the said advances.

Upon the argument of this demurrer, the defendant objected to the sufficiency of the declaration, upon the grounds—1st. That it did not set out the particular drafts which the plaintiffs had accepted for the accommodation of Cummings, giving their amounts. 2nd. That it did not aver notice to the defendant of the non-payment by Cummings of the drafts as they respectively became due.

Dr. Connor, in support of the demurrer to the 5th plea,

cited Cro. Eliz. 260, 870; 3 Tyr. 259; 14 M. & W. 831; 3 Tyr. 259; 3 Ch. Plg.; 11 M. & W. 849; 9 M. & W. 405; 3 M. & W. 503; 2 M. & W. 775; 2 Q. B. R. 828, 64: and, as to the insufficiency of the declaration, he cited 5 Man. & Gr. 860; 12 M. & W. 254; Ch. on bills, 9 Ed. 441, note and subsequent pages; 5 M. & ScL. 62; 1 B. & C. 10; 3 B. & C. 445; 6 B. & C. 373; 8 Ea. R. 243; 5 M. & Gr. 559.

George Sherwood, contra. He cited 2 Taunt. 206; 8 Ea. R. 242; 1 Cr. M. & R. 522, 12; 3 Dowl. 193.

ROBINSON, C. J., delivered the judgment of the court.

Upon the argument of this demurrer, the defendant's counsel took exceptions to the declaration, because it did not set out the particular drafts which the plaintiffs had accepted for the accommodation of Cummings, giving their amounts, dates, &c. We think this was not necessary; they may have been very numerous, and on that account inconvenient to set out. But it is not on the drafts that the debt is charged: the statements in the declaration result in an allegation of monies advanced by the plaintiffs for Cummings, which the defendant was by agreement bound to cover: and besides, the defendant pleads over, and tenders an issue that Cummings did actually consign to the plaintiffs more than enough to cover all the advances; and this would cure any objection of not setting out the bills.

Then the defendant further objected, that the declaration should have averred notice to the defendant of the non-payment by Cummings of the drafts as they respectively became due; but we are of opinion that there was no necessity for such notice, and that this case differs from *Phillips v. Astling* (2 Taunt. 206, 8 Ea. R. 242), and that class of cases; and besides, the bills in fact were paid. What he undertook was, that the acceptors should be covered. The defendant was to have no remedy upon the bills against any one; and he stood like any other security, having no other claim to notice of their principal's default than sureties in general have.

As to the pleas, we consider them all insufficient—not

because they conclude with a verification, but on other grounds.

The defendant engaged that the plaintiffs' advances *should be covered by flour* (to be consigned to them), *together with commission, or should be repaid in cash at the maturity of the drafts*. And in his fifth plea, he pleads "that before the maturity of the drafts, which amounted in all to 1500*l.*, the plaintiffs did receive from Cummings to cover the same, sending large quantities of flour, amounting in the whole to 990 barrels, and did sell the same for a large sum—namely, 1657*l.* 5*s.* 9*d.*, and much *more than sufficient* to cover the amount of the said drafts so accepted, &c., and the said commission in the declaration mentioned."

It ought, we think, to have been directly averred, that the plaintiff's advances *were covered*, together with commission—not merely that the plaintiffs did receive flour from Cummings *to cover* the advances; and it is besides clearly informal to plead that flour was received *much more than sufficient to cover*, &c.; for if such an issue were found for the plaintiffs, it would not decide the case, since the question is not whether *much more flour was received by the plaintiffs* than would cover their advances, but whether *the advances made by them were covered by flour*.

The sixth and seventh pleas, which state the circumstances with some variation from the fifth plea, are subject to the same exceptions.

Per Cur.—Judgment for the plaintiffs on demurrer.

WILT V. NICHOLAS LAI, SEN., & NICHOLAS LAI, JUN.

As to mortgages on a Sunday being void, under 8 Vic, ch. 45, sec. 2.

The giving or taking *in security* on a Sunday is not void as "a buying or selling" within the provincial statute 8 Vic. ch. 45, sec. 2.

Trespass—*quare clausum fregit*.

1st count: Entering and expelling plaintiff.

2nd count: Breaking and entering, cutting and taking away grass, buck-wheat, &c.

Pleas: 1. Not guilty.

2. That the close was not plaintiffs,—nor the grass, corn, &c.

3. That the close was the freehold of the defendant, Nicholas Lai, sen., wherefore he and the other defendant entered, &c.

Verdict for plaintiff on 1st and second issues. Damages assessed for the value of certain fall wheat taken by defendants, 35*l.*, and for the residue of the crops taken by defendants 53*l.*, and for defendants on third issue.

And it was by consent reserved at the trial as a question whether, upon the evidence, the plaintiff was entitled to recover in respect to the fall wheat; if not, the 35*l.* was to be disallowed, and the plaintiff was to enter up judgment only for the residue of the damages found.

The question depended upon the point, whether a bill of sale made by plaintiff to the elder Lai, one of the defendants, of the crops on the ground (which included the wheat in question) was not void under our statute 8 Vic. ch. 45, sec. 2, being made on a Sunday, as it was proved to be, and being not a transfer by way of absolute sale, but a mortgage to secure the payment of a certain sum of money due by plaintiff to Lai, and so expressed to be made in the writing.

Freeman obtained a rule to reduce the verdict on the leave reserved. *Duggan* shewed cause. The authorities referred to were 7 Vic. ch. 45, sec. 2, 3; 6 U. C. R.; 6 Bing. 554; 3 M. & W. 144; 4 M. & W. 282.

ROBINSON, C. J., delivered the judgment of the court.

In a case between Lai and Stall (6 U. C. R. 506), in which the same instrument and the effect of it came before us to be considered for another purpose, I intimated my opinion, though the question was not necessary to be determined in that case, that the prohibition in the second clause did not extend to the case of a mortgage, but only of a sale in the common acceptance of that term.

The words of the statute are, that "all sales and purchases, and all contracts and agreements for sale or purchase of any real or personal property whatever, shall be utterly null and void."

The instrument in question was executed on a Sunday. It professes to give in security to the defendant Lai "the

personal property specified in the inventory at the foot of the writing; to hold the same until such time as he, the said Joseph Wilt, shall pay to the said Nicholas Lai, the sum of 78*l.* 15*s.*; and as soon as the said Joseph Wilt shall pay to the said Nicholas Lai the above sum, then the goods and chattels mentioned in the inventory shall be restored to the said Joseph Wilt by the said Nicholas Lai."

To the inventory, which is written below the signatures and seals of the parties, there is this heading: "Inventory of goods and chattels delivered to N. L. by J. W., in security of the above mentioned sum of 78*l.* 15*s.*, *to be paid on the 1st day of September 1848.*"

If no day of payment had been mentioned in the heading of the inventory, as there is none in the body of the writing, then the only effect would be to create a lien in the nature of a pawn. It would neither have been an absolute sale, nor a conditional sale, subject to a defeasance by paying on a certain day—in other words, a mortgage; but we may look on the words in the heading of the inventory as part of the instrument, and they would give it the operation of an ordinary mortgage of personal property, conditioned to be void on payment of a sum by a day named.

The point is, whether that comes within the statute, and is therefore void, as it must be if it comes within the word sale or purchase.

The opinion that it did not, expressed in the case referred to, was only my own impression at the moment, considering as I did that the statute, creating as it does new offences, was part of the criminal law—not to be extended by any liberality of construction to cases not within the letter; and also considering that the natural right to transfer one's property was not to be interfered with under the pretence of any positive law, farther than such positive law in terms restrained it. I have difficulty still in making up my mind to any other view of the question.

If an indictment or conviction, framed under the third clause of the same statute, which speaks only of *selling* or *purchasing* property, were to charge only that the defendant as a security gave certain property to be held in security—

in other words, that he mortgaged it—I do not consider that it could be sustained, because it would not charge any offence specified in the act; and if the charge were for buying or selling, then I think in the administration of criminal law, it could not be supported by evidence of a giving in security merely,—because that really is not in strictness a buying and selling. Nor can we properly give the words a greater latitude of construction in order to hold this transaction void, when relied upon in a civil action. Not long ago we found it right to hold that a mortgage of a ship came within the word “sold,” as used in the 13th clause of our Ship Registry Act, 8 Vic. ch. 5; so that the mortgage would be void unless it contains a recital of the certificate of ownership.

The act contains within it sufficient evidence that the provision was intended to apply to mortgages; and in England the same form of words has been held to embrace mortgages of ships; and in the reason of the thing they ought to be included, considering the purposes for which the certificate was required to be inserted—namely, to afford convenient and ready means of obtaining precise information. There is not the same argument for latitude of construction in this case; but on the other hand it must be admitted to be in general true, that a mortgage is looked upon in law as a sale subject to a defeasance, or qualified, not an absolute transfer.

In *Drury v. Defontaine* (1 Taunton, 135), Sir James Mansfield, C. J., when the question arose—as it does here, incidently in a civil action—declined to extend the prohibitions contained in 29 Car. II. ch. 7, passed for the better observance of the Lord's Day, by any liberality of construction beyond the letter. He said, the bargaining for and selling horses on a Sunday was certainly a very indecent thing, and what no religious person would do; but that the law had not gone so far as to say that every such contract made on a Sunday shall be void, but only those made by persons in the ordinary exercise of their calling; and in conclusion he said, “although it is to be lamented, the sale must be held good.”

In *Fennel et al. v. Ridler* (5 B. & C. 406), Mr. Justice Bayley, though he did not at all question the decision in the case I have just cited (for the point to be determined by him was not affected by it), seemed disposed to look upon the act as one that ought to be liberally construed for advancing its object. "The spirit of the act," he said, "is to advance the interests of religion, to turn a man's thoughts from his worldly concerns and to direct them to the duties of piety and religion, and the act cannot be construed according to its spirit, unless it is so construed as to check the course of worldly traffic." And in another part of his judgment the learned judge held, that "the statute is entitled to such a construction as will promote the ends for which it was passed;" but when he determined that the transaction then under his consideration came under its prohibition, he rested his judgment not only on the principle that the purchase by the plaintiff was within the mischief intended to be suppressed, but he held also that "*it was within the words made use of to suppress it.*"

The question before us cannot be solved by either of these decisions. I refer to them only to shew, that the point whether we are at liberty to construe the act liberally for the prevention of indecent trafficking on a Sunday, or must take it strictly according to its letter, is one on which different language has been at different times held by courts of law in England. I incline still to think that a giving or taking in security is not a buying or selling within the statute, and that we cannot thereby clearly hold this transaction to be void.

That appears to me to be the soundest construction of the act, considering, as I think we must, that we cannot consistently hold a mortgage to come within the words "sale or purchase," in the second clause of the act, unless we could also give the same comprehensive construction to the words "sale or purchase," as used in the third clause, and we could not, I think, do that without violating well settled principles of law.

My brothers, I believe, concur in this opinion; and the verdict is to be entered accordingly, excluding the value

of the fall wheat, which we hold to have passed to Lai, in security for his debt: but not as on a sale.

Per Cur.—Verdict to be entered, excluding the value of the fall wheat.

MILLER V. FERRIER.

Endorsee v. endorser of a note—Plea, an accommodation note—Demurrer.

It is no defence to an action on a note by the endorsee (a holder), against the endorser, that the plaintiff gave no value to the endorser for his endorsement, or that he took the note knowing at the time he took it that it was endorsed for the accommodation of the maker.

Declaration—endorsee against endorser of a note.

Plea: That defendant endorsed the note for the accommodation of the maker, without having received any value therefor, and that said note was endorsed to the plaintiff, &c., without any value given by him for such endorsement.

Demurrer: That said plea was no defence in law.

Richards for the demurrer. *Phillpots* contra. Cases cited: *Chitty on Bills*, 305-6, 317; 2 Cr. M. & R. 342; 2 Wm. & W. 414; 6 D. & R. 120; 4 Man. & Gr. 101; 2 L. & D. 487; 3 Ch. Pl. C. 151; 3 A. & E. N. S. 459.

ROBINSON, C. J., delivered the judgment of the court.

If the plea which was demurred to in this case were held to be a good defence, there would be no meaning or object in accommodation paper; for what is set up in this plea is just what the fact is in every note which is endorsed by one man for the accommodation of another, in order that the person intended to be accommodated may obtain a discount upon it, or may pay or secure a debt, or obtain credit. In all these cases, the person endorsing usually does so without receiving any value or consideration for the endorsement—or rather, his consideration for endorsing is the pleasure of obliging his friend.

It is no objection to the plaintiff's recovery in any such case, that he gave nothing to the person who endorsed the note to him, which is all that this plea imports. The only question that can affect him is, whether he is a holder for value or not, which this plea does not deny.

The consideration usually in such cases is some transaction between the endorsee and the person accommodated, which we are to suppose existed in this case, for the plea does not deny it.

There is a precedent in 3 Chitty's Pleadings, 151, which was relied upon in support of this plea, but it does not apply; for there the action was against the acceptor of a bill who stands in the place of a maker of a note, not of an endorser; and I suppose the declaration in that case stated that the bill was endorsed to the plaintiff by the drawer, and if such endorsement were without consideration, then the plaintiff had given no value to any one. The terms of the plea, besides, vary from this in another important particular.

The obvious remark of Lord Eldon in *Smith v. Knox* (3 Esp. C. 46), is an answer to this *plea*. "If a person," his lordship said, "gives a bill of exchange for a particular purpose, and that is known to the party who takes the bill—as for example, if to answer a particular demand—then the party taking the bill cannot apply it to a different purpose; but where a bill is given under no such restriction, but given merely for the accommodation of the drawer or payee, and that is sent into the world, it is no answer to an action brought on that bill that the defendant, the acceptor, accepted it for the accommodation of the holder, and that fact was known to the holder; in such case the holder, if he gave a *bona fide* consideration for it, is entitled to recover the amount, though he had full knowledge of the transaction."

Per Cur.—Judgment for plaintiff on demurrer.

SHAW ET AL. V. NICKERSON.

GILLESPIE ET AL. V. NICKERSON.

Power of judge in chambers to open or rescind his own order—Client's right to interfere with liberality of his attorney's practice—As to power of appeal from decisions of judge under 4 Wm. IV. ch. 10, sec. 4.

A judge sitting in chambers has authority in his discretion to open again an order which has been granted by himself, or even to rescind it, before it has been carried into effect, upon his discovering that he has made it inadvertently, or that he has been surprised into making it by any perversion or concealment of facts, or from any misconception on his part of the law or facts.

A client is not to be regarded as having a right to govern the conduct of his attorney as to the degree of liberality he shall observe in his practice.

A judge, when applied to in vacation under the act 4 Wm. IV. ch. 10, sec. 4, for the commitment of a debtor on the limits to close custody, disposes of the case without the power of appeal by declining to interfere.

A rule nisi was served on the defendant, to shew cause why the orders made by Sullivan, J., on the 28th March

1850, should not be rescinded for irregularity, on the ground that the judge's summons issued in such case had been discharged by Mr. Justice Burns, and therefore that Mr. Justice Sullivan had no authority over the matter of the said summonses; or why the said orders of the 28th March should not be rescinded, and the orders of the 22nd March 1850 stand; or why the court should not make such other order in these causes as might seem just on reading the affidavits and papers filed.

The facts were, that on the 11th March 1850, a summons was obtained by the plaintiffs on the defendant in each cause, to shew cause why the defendant should not be committed to close custody, which summons was enlarged to the 22nd March 1850; and then no one appearing on the defendant's part, Mr. Justice Sullivan made the order as on no cause shewn.

The defendant's attorney had intended to shew cause, but mistook the day; and hearing of the order having issued, called immediately on the plaintiff's attorney and requested him to consent to the matter being opened, and to allow him to be heard. The plaintiff's attorney declined; but promised not to use the orders till the defendant's attorney should apply to Mr. Justice Sullivan to open the summons.

Mr. Sullivan, on the 23rd March, made an order suspending his former order, and appointing a day for the defendants to shew cause against the order issuing. On the 28th March, the attorneys for both parties being before him, Mr. Justice Sullivan made an order reciting the first summons and his former order upon it, the application of defendant's attorney to open the matter, and the attendance of both parties before him on the 28th March; and that plaintiff's attorney being present and shewing no cause to the contrary, he ordered that on payment within a week by defendant of the costs of moving absolute, the summons in each cause and of the order made on 23rd March, the said *order* should be rescinded—to remain in force if costs not paid.

An appointment was served to tax costs, but the plain-

tiff's attorney refused to attend or to accept costs, and had moved to rescind this last order on the grounds stated in the rule nisi.

ROBINSON, C. J., delivered the judgment of the court.

This does not appear to us to be a reasonable application. Mr. Justice Sullivan, sitting in chambers, must be allowed to have authority, in his discretion, to open again an order which has been granted by himself; or even to rescind it before it has been carried into effect, upon his discovering that he has made it inadvertently, or that he has been surprised into making it by any perversion or concealment of facts: but here, all that was done was to suspend the order, that the opposite party might be heard. He had made it as upon no cause shewn, supposing that the defendant did not intend to oppose it, because he did not appear on the return of the summons; but it was afterwards stated to him that the non-appearance arose from a mistake of the day of return, and that it had been intended to shew cause against it. Under such circumstances, it would have been unreasonable not to have opened the rule and allowed the defendant to be heard; and more especially where the object of the order was to take the defendant from the limits and to commit him to close custody.

The opportunity which the learned judge thought it proper to allow was only what the opposite party should, under the circumstances, have conceded at once, without putting the judge or the defendant to the trouble of a formal application. I think it was stated in this case that the clients (that is the plaintiffs) would not allow this liberal course to be taken, but insisted on their attorney preserving the advantage which he had gained by the accidental omission of the attorney of the other party.

I should be surprised to find that a client would reconcile such a course to himself if the facts were explained to him, when the effect would be to deprive a man of his liberty without giving him an opportunity of being heard; though it may be that the plaintiffs in these cases, under an idea of the defendant having behaved ill to them (as perhaps he may), might be unwilling to waive any advantage. There

is seldom, however, any good gained by such a course, since the court must, so far as the practice will allow, see that the ends of justice are attained. Attempting too rigid a practice has seldom any other effect than to increase costs and to consume unprofitably the time of the court. And I must take this occasion to say, that I do not consider that a client should be regarded as having a right to govern the conduct of his attorney in such matters; and the attorney, I think, is not bound to lay before his client every opportunity he may have of shutting out the other party from a hearing, nor bound to take or follow the direction of his client as to the degree of liberality which he shall observe in his practice.

Then the learned judge having thought it right to open the matter, found it also right in his judgment, upon the facts laid before him, to rescind the first order and to forbear committing the defendant to close custody. We are asked to review this last order discharging the summons, and to rescind it; but we consider that when a plaintiff goes before a judge in vacation, under the 4th clause of the 4th William IV. ch. 10, to apply for the commitment of a debtor on the limits to close custody, the decision made by the judge on such application declining to interfere, disposes of the case; for he is not acting then as in ordinary matters in chambers, under an authority delegated as it were by the court, but he is executing an authority committed to him by an act of parliament, and no appeal has been given by the act. Of course it would be open to the party to apply to the court upon new grounds, and as a distinct application.

Per Cur.—Rule discharged, with costs.

MCMILLAN V. MILLER.

Growing timber—when to be considered part of the inheritance, and when as chattels—Action of trespass.

Where plaintiff declared in trespass for that defendant on, &c., with force and arms, felled, &c., *the trees* (viz. 115 oak trees) *of the plaintiff, then growing and being in and upon certain lands in the county of Middlesex* (not saying on *his own land*), the court refused to arrest the judgment, on the ground that the plaintiff could not sue for cutting down growing trees as for an injury to chattels, but that the action should have been for trespass to real property, laying the destruction of the trees as aggravation.

The plaintiff declared in trespass, for that defendants on the 20th September, and on divers other days, &c., with force and arms, felled, cut down, prostrated and destroyed, *the trees*—namely, 115 oak trees, &c.—*of the plaintiff*, of great value, &c., *then growing and being in and upon certain lands in the county of Middlesex*, and took and carried away the same, and converted and disposed thereof to their own use, against the peace and to plaintiff's damage, &c.

The defendants pleaded "not guilty;" and secondly, that the said trees in the declaration mentioned were not the trees of the plaintiff.

The plaintiff had a verdict, and the defendant moved to arrest the judgment, on the ground that the action should have been for trespass to real property, laying the destruction of the trees as aggravation, for that the plaintiff could not sue for cutting down growing trees as for an injury to chattels.

ROBINSON, C. J., delivered the judgment of the court.

We think we should not arrest the judgment, for the plaintiff does not sue for felling trees growing on *his own* lands, but growing *upon certain lands in the county of Middlesex*, and for all that appears the plaintiff may be the vendee of trees growing upon another's land, in which case the trees *quoad* him would be chattels. After verdict we should intend that this was so, or that the plaintiff would not have been allowed to recover.

The quaint remark in 11 Co. 50, that timber trees cannot be felled with a goose quill, has some exceptions (for certain purposes), for if the owner of the soil grant all his trees, they are thereby severed from the inheritance, and so become personalty.

Per Cur.—Rule discharged.

HARTLEY ET AL. V. JARVIS.

Right of landlord to distress where the lease expired—Pleas involving landlord's title at time of demise.

A landlord cannot distress where his interest in the estate has expired before the distress.

Any plea to an avowry involving a denial of the landlord's title, at the time of the demise, is bad.

Replevin—avowry.

Third plea to avowry—that (in effect) the landlord's interest in the estate had expired before the distress.

Demurrer to the 4th, 5th, and 6th pleas all rested upon the averment, that although the tenants by force of the demise, which was admitted in the pleas to have been in writing, took the term from the defendant as their landlord, yet that it was understood and known between them that another person, and not the lessor, was in fact the landlord, and that to him the rent was payable. The 6th plea, also, set up a forfeiture committed by the tenants themselves.

These pleas were all demurred to, as being no answer to the avowry.

Freeman for the demurer to the pleas. *Jarvis* contra. Cases cited—10 A. & E. 204; 11 Law Jl. Q. B.; 1 Cr. W. & R. 258; 9 A. & E. 809; 3 Ch. Pl. 475.

ROBINSON, C. J., delivered the judgment of the court.

The 3rd plea to the avowry seems to be according to the proper form of a plea, by a tenant, that his landlord's interest in the estate had expired before the distress—in which case, having no reversion, he could not legally distrain.

The tenant is never estopped from pleading that, because it is not repugnant to anything he has admitted by taking the lease.

The 4th, 5th, and 6th pleas are clearly bad—for they all rest upon averments, which the plaintiffs, as tenants, are not at liberty to make—namely, that the landlord had no right to make the demise; and that although the tenants by force of the demise, which is admitted in the pleas to have been in writing, took the term from the defendant as their landlord, yet that it was understood and known between them, that another person, and not the lessor, was in fact the landlord, and that it was to him the rent was payable.

The 6th plea has the same fault as the 4th and 5th, as involving a denial of the landlord's title at the time of the demise; and it is bad for the further reason, that it sets up a forfeiture by an act committed by the plaintiffs themselves, and without stating what that act was, so that no

issue could be raised upon it ; and it alleges that by reason of a failure of a condition in a lease made by *Archibald Jarvis*, as landlord, *John Jarvis* brought ejectment, which is repugnant and absurd.

There can be no question that these three pleas are bad.

Per Cur.—Judgment for the plaintiffs on demurrer to 3rd plea, and for the defendant on the demurrer to the other pleas.

JUDGMENTS DELIVERED IN EASTER TERM, 1850.

Present.—THE HON. J. B. ROBINSON, C. J.

THE HON. MR. JUSTICE DRAPER.

THE HON. MR. JUSTICE BURNS.

ASHFORD V. GOHEEN ET AL.

Pleading—*Letters Patent—their non-existence, how to be pleaded.*

In a declaration on the case for procuring without reasonable cause the plaintiff to be indicted at the court of Oyer and Terminer—averments that the defendant on the 2nd of June, went before a court *holden* on the 1st of June—and that the plaintiff was acquitted at *Nisi Prius*, on an indictment found by the court of Oyer and Terminer, were held bad.

Where a defendant means to deny the existence of letters patent, *nul tiel record* is not the proper plea.

This was an action on the case for procuring the plaintiff, without any reasonable cause, to be indicted at the court of Oyer and Terminer and general gaol delivery.

The declaration was long, containing recitals of the commissions of Oyer and Terminer and gaol delivery ; and among other averments it stated that the defendant, on the 2nd of June, went before a court *holden* on the 1st of June, and that the plaintiff was acquitted at *Nisi Prius*, on an indictment found by the court of Oyer and Terminer.

The defendants, wishing to deny the existence of the letters patent, assigning the Chief Justice and others his fellows, to hold the assizes, &c., pleaded *nul tiel record*, instead of denying their existence by a plea that the Queen did not assign them to be justices, &c.

The court, as it will be seen below, gave the parties leave to amend both the declaration and the plea, both being defective.

ROBINSON, C. J., delivered the judgment of the court.

We think both parties should amend their pleadings.—The declaration is unnecessarily filled with recitals of the commissions of Oyer and Terminer and gaol delivery, and the plaintiff states that the defendant on the 2nd of June went before a court holden (not begun and holden) on 1st June, which is inconsistent; and it avers that the plaintiff was acquitted at *Nisi Prius*, of an indictment found by the court of Oyer and Terminer.

The pleas are clearly bad. If it could serve the purpose of the defendant to deny that the alleged proceedings took place before *a court legally constituted*, he should not have pleaded *nul tiel record*; but, as when letters patent are denied on other occasions, he should have denied their existence; not that there is any record of them, for they are themselves matters of record, and prove themselves on production. When a grant under the great seal is denied, the plea is *non concessit*; not that there is not any record of the grant.

By analogy, it would be here that the Queen did not assign the persons named to be justices, &c.; but I do not mean to say that it would answer the purpose of the defendant to set up such a defence: he must consider that.

We think the parties should be allowed to amend on both sides without costs.—See 2 Salk. 510; 1 Saund. 189, 487; 9 Jurist, 1087; Arch. Pleadgs, 134, 444.

TRAINOR v. HOLCOMBE.

Mandamus to county court, where it will be issued.

Where in matters of tort relating to personal chattels, the question of title to land shall be brought in question, though incidentally, the judge of the county has no jurisdiction under 8 Vic. ch. 13, sec. 6.

This court will only grant a mandamus to the judge of the county court in cases where there is no doubt of his jurisdiction.

Mr. *Freeman*, of Hamilton, moved for a mandamus to the Judge of the County Court of the counties of Wentworth and Halton, to try the issue in this cause, which the learned

judge of the County Court had declined to do, under the impression that the case upon the facts proved was not within his jurisdiction.

The action was trover and conversion of grain and turnips.

The pleas were not guilty and not possessed.

The case came on for trial and evidence was received. The dispute was whether this property, which the defendant had caused to be seized on execution, as being the property of one Barman, his debtor, were the goods of Barman, or of this plaintiff, and that depended upon whether a deed which Barman had made in May, 1848, of the land on which the grain and turnips were raised in the year 1849, was a *bona fide* conveyance, or fraudulent with intent to defeat creditors. The plaintiff, it appeared by the evidence, had never in fact cultivated or possessed the place since the deed was made, but allowed Barman to occupy it, pretending that Barman was working for him as his hired servant; at least that was the case which the defendant endeavoured to establish, and the plaintiff to disprove, and in order to determine the right to the crops, they were in fact litigating about the title of the land, which was thus brought in question, though incidentally.

ROBINSON, C. J., delivered the judgment of the court.

The 6th clause of 8 Vic., chap. 13, gives jurisdiction to the district courts (now county courts) in matters of tort relating to personal chattels, only where titles to land shall not be brought in question; and we do not see how the judge could have disposed of this cause, without assuming a jurisdiction which the act does not give him, to determine who was the owner of the land.

We should never grant a mandamus unless the judge failed to proceed in a case where, in our opinion, there was no ground for doubt.—See 3 C. B., 243; 5 D. and L. 648; 6 Con. B. 84.

Per Cur.—Mandamus refused.

DOE DEM. BARWICK ET AL. V. CLEMENT.

Ejectment—joint tenants—Building Society—Act 9, Vic. ch. 90, sec 12.

Joint tenants in bringing ejectment, may sever in their demise. Under the 12th sec. of the 9th Vic. ch. 90, the president and treasurer of the building societies may sue in their proper names without further description.

Ejectment for N. $\frac{1}{4}$ of W. $\frac{1}{2}$ of 6, in 9th con. Zorra.

This action was brought on the several demises of Hugh C. Barwick, laid to have been made on the 1st of June, 1849, and of John Greely, laid on the same day.

The plaintiff proved a deed dated the 15th February 1847, from the defendant and his wife, to Hugh Donaldson, and a mortgage made 13th April, 1847, by Donaldson, to Hugh C. Barwick, president of the building society of the district of Brock, and David John Hughes, Esq., treasurer of the same society, *habendum* to the parties of the second part (the grantees) their successors in office, and their assigns, to the use of the said parties of the second part, their successors and assigns forever, upon trust, to and for the benefit and behalf of the said society, according to the form of the statute in such case made and provided, and the rules of the said society for the time being.

At the trial the defendant moved for a non-suit, on the ground that the title was vested by law in the president and treasurer jointly, and so they could not demise severally.

The learned judge was of that opinion, but allowed the case to go on, reserving leave to the defendant to move in term for a non-suit on that objection.—Verdict for the plaintiff.

Miller, of Woodstock, obtained a rule for a non-suit on the leave reserved, and cited 3 U. C. R. 198; Woodfalls L. & T. 793; 4 B. & C. 462; 3 Mod. 261; 1 B. & Ad. 608; 4 Dowl. 222.

D. B. Read, shewed cause—he referred to 3 U. C. R. 293; 2 U. C. R. 389; 9 Vic. ch 90, sec. 12; 12 Ea. R. 39; 3 Campb. 190; 1 Ea. R. 64; 2 Inst. 388; 10 B. C. 885; 5 B. & C. 433; 15 M. & W. 622.

ROBINSON, C. J., delivered the judgment of the court.

The cases of Doe dem. Raper v. Lonsdale, and Doe dem. Marsack v. Read, 12 Ea. R. 57, show that there is nothing in the objection that joint tenants cannot sever in their demise. We have had that point before us in other cases.

Then, as to the peculiarity of this case, arising from the nature of the interest of the lessors of the plaintiffs. Whether the action can be maintained as it is brought,

depends on the 12th sec. of our stat. 9 Vic. ch. 90, providing for the establishment of building societies. That clause declares "that all real estate, and all titles, &c., shall be "vested in the president and treasurer of each society respectively, for the time being, for the use of the society, "without any assignment or conveyance whatever being "necessary on account of any change of president or "treasurer by death, or removal, &c., and shall for all "purposes of actions in law or equity, concerning the same "be deemed to be, and shall in every such proceeding, "when necessary, be stated to be the property of the president and treasurer for the time being, *in the proper names* "of such president and treasurer, without further *description*; and such persons shall, and they are thereby authorized to bring or defend any action, suit, &c., touching the "property belonging to or held by the said society, and may "sue and be sued in their proper names as president and "treasurer, without other description. The 13th clause provides that the secretary may be a competent witness, "notwithstanding, he may also be a treasurer of the society, "and that his name may have been used in any such action "as such treasurer."

No objection seems to have been taken at the trial except to the lessors of the plaintiffs having severed in the demise, and therefore, in strictness, none other could be now urged by the defendant; but we do not see that there is room for any. These building societies are corporations, but their president and treasurer have no corporate capacity; and the evident meaning of the act is that they shall use their proper names in suing—as in the case reported in 4 Dowl. 222, where the provisions of the statute then in question were much like these in effect.

Their stating the demise to be by them in their proper names, without further description, is sanctioned by the act. The plaintiff, as in other cases of ejectment, is John Doe.

It would have been better, perhaps, to have proceeded as on a joint demise, but we do not see that any difficulty is created by the several demises, which entitle the plaintiffs to recover for the whole interest.—(See 6 Ea. R. 173; 3 Campb. 190.)

Per Cur.—Rule discharged.

HUNTER v. VERNON.

Where the writ of trial is only to try the issue, and contains no special venire to assess damages, the jury have no authority to assess damages on breaches suggested (a).

In easter term, 1850, the defendant's attorney, by *M. Cameron*, obtained a rule nisi, to shew cause why the verdict and assessment of damages before the judge of the county court should not be set aside and a new trial had, on the ground that the jury had no authority to assess damages on the breaches suggested; the writ of trial being only to try the issue, and there being no special venire in the writ, to try and assess; and because the notice of trial gave no notice that damages would be assessed.

The writ of trial directed the judge "to summon a jury to try the issues, and to return the same, with the finding of the jury endorsed thereon, pursuant to the statute," so that it contained no authority to assess damages on the breach: but it was objected by the plaintiff, that if there were an error, the root of that error was in the writ, and therefore, that the defendant should have moved to set aside the writ itself, and not lain by and moved only against what had been done under it.

Eccles showed cause. Cases cited.—2 Stark, C. 381; 1 M. & W. 42; 6 Dowl. 714; 2 Chitty, genl. prac. 729; 8 T. R. 225.

ROBINSON, C. J., delivered the judgment of the court.

If it be clearly wrong that the county court should have done anything more under the writ than try the issues, we cannot allow a proceeding to stand which will have been illegal because unauthorized.

We regret that we have found ourselves compelled, on the authority of the cases cited, to come to the conclusion that the writ of trial, and the proceedings under it, must be set aside. I refer to the cases of *Quin v. King*, 1 M. & W. 42; *Scott v. Staley*, 4 Bing. N. C. 724; *Parkins v. Hawke-shaw*, 2 Stark, N. P. C.; *Lawes v. Shaw*, 5 Q. B. Rep. 322; and *Ethersy v. Jackson*, 8 T. R. 255.

(a) See the strong language of the C. J., against the practice, to which he only assents on account of the inconvenience which might arise from pursuing a different course of practice to that followed in England under the same statute.

I must say, however, that it is rather from the impression I have of the inconvenience which would follow, if we should take a different course in matters of practice of this kind from that pursued in England under the same statute, than because the course which has been taken in England seems to me to be reasonable, that I concur in making the rule absolute.

The statute 8 & 9 Wm. III. ch. 11, or rather that clause which relates to the suggestion of breaches, is spoken of, in some cases, as a provision that should receive a liberal construction; and I think it would have required no extraordinary liberality of construction, to have held, that in all cases in which there was an issue, or issues, to be tried, the jury sworn to try that issue, should, under the statute, be considered to be authorized to assess damages on any breach *suggested*, as well as any breach *assigned*, without a special venire for that purpose. There was an imperfection in the statute, which the decision in *Ethersy v. Jackson* (8 T. R. 255), by a liberal construction, remedied, allowing breaches to be suggested where there was an issue in fact, without any assignment of breaches in the declaration or replication; although, if we were to follow the very words of the statute, there could be no suggestion in any other case than where there was a judgment on demurrer, or *nil dicit*, or by confession.

The case before us is one of that kind: the plaintiff sues on a bond merely—the defendant pleads that the bond was obtained by fraud and covin, which the plaintiff denies, and then he suggests a breach, being under the same necessity to do so as he would be if there were a plea of *non est factum* alone on the record. In cases where there is no issue in fact, the legislature felt that the jury must be summoned for the very purpose of assessing damages on the breach suggested, because there was nothing else to charge them with but that; but where there were pleadings, on which an issue in fact was joined, and on which breaches had been assigned under the statute which first authorized assessing several breaches, and leaving no necessity for a suggestion, the legislature dispensed with any

special venire to assess the damages, and directed that the jury which tried the issues should do the other: and why the jury assembled to try the issues in this case should not have been intended by the statute to assess damages on breaches suggested, as well as breaches assigned, cannot be accounted for, I think, on any very solid reason.

No doubt there is a technical difference between breaches assigned and breaches suggested, but that difference need not have led, I think, and could never have been intended to lead, to a difference in practice, such as has been established by the cases referred to.

The legislature, it is plain, only omitted to speak of breaches suggested, in connection with the trial of issues, because they had accidentally omitted to consider that there might be such a state of the record; and where that omission was supplied by a liberal construction of the act beyond its letter, I think the courts might have gone a step farther, and held, as a consequence, that a jury acting under such a record, at *nisi prius*, might act in the same manner as a jury trying issues on a record, in which the breaches had been assigned. However, there may be good reasons for the difference in practice which do not strike me, and at any rate, the authorities are clear upon the point.

Perhaps it may be, that the jury have in all cases to try the truth of the breaches suggested, although they are not pleaded to, and that they could not consistently be understood to have been sworn to do this when nothing is said in the venire about 'breaches, and where they are not involved in any issue on the record, by being charged in the declaration, or in a replication.

Per Cur.—Rule absolute—not with costs.

McLELLAN AND WIFE V. MEGGATT, NESS AND REID.

Will—construction of—as to whether an estate for life, or in fee passed. *Dower*—right to Dower—where estate contingent—where an exchange of land.

A testator, after making specific devises of certain land, then adds, “at which time (i. e., after his youngest son shall have arrived at the age of 21 years), it is my will that the whole of my lands be divided into four equal parts,—one part of which I give and bequeath to my two daughters, Catharine and Sarah, the other three parts to be divided amongst my three sons, John, Peter and Simon.” *Semble*, that under this devise of the residuary estate, the devisees

took not a vested estate, but a contingent and future estate, and *that for life only*; the estate, in the mean time, vesting in the heir at law. *Semble*, also, that the heir at law would then have an estate, which would not entitle his widow to her *claim for dower*; the estate not being a beneficial estate of inheritance, but a mere temporary interest of uncertain duration, contingent upon distribution being made in pursuance of the will.

A wife cannot be endowed of land given in exchange, and also, of land taken in exchange, but she has her election to have the one or the other.

Samuel McLellan and Mary McLellan, which latter was the widow of John Poturff, deceased, sued for Mary McLellan's dower in land in Binbrook, of which she declared John Poturff was seized during coverture.

Pleas: 1st. *Ne unques seizie que dower.*

2nd. *Non tenuere.*

3rd, 4th and 5th pleas demurred to. 6th plea, the same effect as the first. 7th. *Ne unques accouple.*

Issue was joined on 1st, 2nd, 6th and 7th pleas.

The facts were these: John Poturff died seized of the land out of which this dower was claimed—namely, the south half of lot No. 6, in the first concession of Binbrook, with a considerable quantity of other lands. He died in or before the year 1811, having made his will on the 2nd of March, 1809, by which he divided the farm on which he then lived, (not the land now in question), to be at the disposal of his wife, till his (youngest) son, Simon Poturff, should come of full age. He devised, also, to his two elder sons, John and Peter, certain other lands, (not the land now in question), to possess and enjoy in whatever manner they should think best, till his said son Simon shall have arrived at the full age of 21 years, “at which time (the will says) it is my will that the whole of my lands be divided into four equal parts, one part of which I do give and bequeath to my two daughters, Catharine and Sarah, the other three parts to be divided amongst my three sons, John, Peter and Simon.” And he also directed, that when his son Simon should come of age, all his personal estate should be sold at public sale, and the amount to be equally divided amongst his sons and daughters. The rest of his will related wholly to personal property.

It was proved on the trial, that John Poturff, his eldest son, was married in 1813 to Mary, now Mary McLellan, one of the plaintiffs; that Peter died in 1830 or 1831,

leaving issue ; that John Poturff died in 1833, leaving issue, still surviving ; and that Simon survived his brother John, the husband of the demandant, and died about 1839, leaving issue. Simon came of age in 1817, his sister Catharine having died in 1814, unmarried, the other sister died in 1818, leaving issue.

It had been intended, it seems, and spoken of in the family, that Catharine was to have the 100 acres now in question, and Sarah the north half of the same lot—which latter Sarah did in fact get ; but Catharine was dead, intestate, and unmarried, before Simon came of age, and before any division could take place pursuant to the will.

In 1821, Catharine being then dead, but all the three of the sons living, and Simon being of age, a division took place of the lands by lot, all being present and concurring. Sarah got a conveyance of the north half of this lot as her share in the division. John got the land on which he lived in Saltfleet as his ; it was conveyed to him, he died upon it, and his widow, who is suing in this action, got her dower out of that land, and is yet living upon it. A surveyor, by assent of all parties, ran the line dividing the north half from the south of this lot in Binbrook, now in question ; and the south half, which was intended, it seems, for Catharine, if she had lived, was in the division given to Simon as part of his share. He was put in possession of it with the assent of John and the others,—though from mere delay, as was sworn to on the trial, no deed was ever made to him. Conveyances were made to all the rest of their respective portions.

John Poturff, in his life-time, did not enter upon this 100 acres, or make any claim to it, but Simon, who lived till 1839, though he never received a deed of the land, bargained it away to one Aitkin, who entered upon it, and made improvements, it being until that time a wild lot. He died in possession, having devised the land to the defendants, his executors, on certain trusts, and they have been receiving the rents and profits, claiming the fee under the will.

There was some evidence, that although John was assenting to the division, by which this portion was allotted to

Simon, he yet said that he thought he was entitled to it, as heir to his sister Catharine, who died in 1814, before Simon came of age.

The Chief Justice told the jury that there could be no justice in this claim of the widow of John to dower out of this lot, because her husband had had his full share on a division to which he was assenting, and when this lot, as he knew, was given to Simon to be his, while John had enjoyed till his death the portion which he received on the division, and his widow was living on it, and had received her dower in the same land ; but, as Simon had received no legal title, it was necessary to see whether John had been seized of any such estate in this land as would give his widow a claim to dower ; and that was the point which the parties agreed should be submitted to this court. It was to be considered that Catharine never could have been sole seized of this land, and John's claim to it therefore by inheritance was untenable.

There could be no doubt that the equitable estate was in Aitkin when he died, and that the heir of John Poturff could be compelled to convey his interest in it, in order to carry the division honestly made into effect.

The questions are : 1st. Did the will of old John Poturff clearly devise a fee, or only a life estate.

2nd. If a fee, then, independently of the consideration of the effect of the division of the property in 1821, by which John Poturff acquired the sole interest in a certain portion of the land as his share under the will, and his brother Simon was, by his assent, placed in possession of the land now in question, it would remain to enquire what legal estate could be said to have been vested in John Poturff during his coverture in the particular land now in question.

The questions were intended by the parties to be reserved for determination in this court, and the Chief Justice recommended the jury to find for the plaintiff on all the issues, reserving leave to the defendant to move to enter a verdict for him on the first issue, if the court should think fit.

The jury came in with a general verdict for the tenants, not being able perhaps, to reconcile themselves to so plainly unjust a claim as the demandant was urging.

The Chief Justice was explaining to the jury, that on some of the issues, as that which denied the marriage, the demandant was entitled to a verdict, when it was perceived that some two or three of the jury, supposing their duty was at an end, had left the box and the court room, and could not be found; he was obliged, therefore, to let the matter rest with the verdict as they returned it.

S. Jarvis obtained a rule for a new trial on the law and evidence. *Freeman* shewed cause. Cases cited: Co. Litt. 9 (b) 1 Robert's Wills, 487, note; C. Cruise 306, 657; 3 T. R. 833; Jarman on Wills, 188, 727; Roper's Husband and Wife, 436, 359, 432; 2 P. W. 489, 612; 3 P. W. 20; 1 Russell 223; 2 Str. 905; 1 P. W. 700; 1 Atk. 494. 1 Ves. Sen. 542; 2 Merivale, 38, 239, 263; 1 Sim. & Str. 328; 6 Ves. 421; 3 Jurist, 577; Park on Dower, 49, 53, 56, 72; 2 Sch. & Lef. 287; 14 Ves. 256; 1 Inst. 32 (a); 3 Leo. 437; Crabbe on Real Property, sec. 1129; Dyer, 59, 281 (a) note 17; 2 Rolls. Rep. 425; Com. Dig. Dower A. 5; Co. Litt. 31 (a) (b).

ROBINSON, C. J., delivered the judgment of the court.

I apprehend that in strictness, nothing vested in the five children on the death of the testator, for there is no previous estate given to any one which would fill up the interval before their estate could become an estate in possession. There is nothing but a direction that at a future day the lands are to be divided into equal portions, and a separate portion granted to each child. It is not a case in which the enjoyment of the estate only is deferred, but one in which time is of the essence of the gift. Then, if so, Catharine dying before her brother Simon came of age, she never had any vested interest under this will to which the demandant's husband could have succeeded, and most certainly she could have had no separate and exclusive interest in the 100 acres in question.

Then I do not see on what ground it could be held, that anything more than a life interest is devised in the residue of the lands. The effect of the will seems to me at present to give not a vested but a contingent and future interest, for life only, to the five children—the estate in the meantime

vesting in the heir-at-law. And if so, then, I take it, the interest of the heir was, under such circumstances, not an estate out of which his widow can claim dower—for he had an uncertain interest, to cease when the time should come for the estate to vest in the devisees under the will—he had not a beneficial estate of inheritance—and there was to be a freehold interest, to last during the lives of others intervening between the seizin which he had during coverture and the accession of the fee.

The direction of the will was in fact carried into effect in regard to all his residuary real estate not specially devised, except this 100 acres in question, which were really assigned to Simon as his portion, and only not formally conveyed to him in consequence of some omission.

Then how stood the bare legal estate in regard to this 100 acres? The testator had given no interest in the residue of his real estate, including these 100 acres, to any one, until upon Simon's coming of age it should be divided into four equal parts, and then he gives among his children these separate portions, but only, as I think, for their lives, though doubtless his intention was otherwise. These 100 acres have accidentally not been made the separate estate of any one under the will. They were apportioned out in a division to Simon as his share, but he died without obtaining a conveyance of them, leaving children surviving him. He had been put into the actual possession of them by his elder brother, the husband of the demandant, who was a party making the division, and up to the time of his death the *husband* of the demandant never appears to have had any actual seizin of this property, while Simon Poturff and his assigns have continued to be the only persons exercising the rights of ownership over it. Under such circumstances, it is quite clear that the real beneficial interest is in those holding under the title derived from Simon Poturff, and that a court of equity could recognize no other person as possessing such interest. But, if by reason of no conveyance having been made to Simon Poturff, in confirmation of the division which took place in 1821 under the direction of the will, the legal estate never vested in him as the husband

of this demandant, and as the other members of the family intended it should do, where has it vested? Either it must have vested in John Poturff, as heir of the testator—but then it would have been an estate of that peculiar kind, that would not give his widow a right to dower in it, not being a beneficial estate of inheritance, but a mere temporary interest of uncertain duration, contingent upon distribution being made in pursuance of the will; or it must have vested, on Simon's becoming of age, in the surviving children, as tenants in common until a division could be made; and no allotment having yet been made of the 100 acres in question, Simon's undivided moiety would go on his death to his eldest son; and the only interest John Poturff could have had, would have been an undivided one-third of three-fourths of the 100 acres—out of which fraction of an estate the widow's dower, if entitled to any, must come.

Whether the five children took a present estate under the will, as tenants in common of the residue, according to their respective interests, or whether it was an executory devise of an estate, which, until a division should be made, would devolve upon the heir; and whether it was an estate in fee, or only a life estate that was devised by the will, this at least appears clearly from the evidence, that the children all believed that they were to take a fee under the will, and that their father so intended, and I have no doubt he did, and they acted upon that understanding, according to the evidence, in good faith, making a division of the lands among them, when Simon Poturff came of age.

According to that division, as I have already mentioned, the 100 acres now in question, out of which dower is claimed, was assigned to Simon as his share, and he was put in possession of it by John, the husband of the demandant, who received, by conveyance from the others, an exclusive title to other land, which he took as his share, and enjoyed till his death, and out of which the present demandant has received her dower.

Unfortunately, it seems the title of Simon was never made perfect by the necessary conveyance, as the titles of the others were. But the substantial justice of the case is

clear. A wife is not to be endowed of land given in exchange, and also of land taken in exchange; but she has her election to have one or the other.—Co. Lit. 31 (6). The same principle applies here in the case of partition. It is therefore manifestly against equity and good conscience, that the demandant, after receiving dower in the land, which by the common arrangement among them, fell to her husband's share, should be suing also for her dower in the land in which he gave up his interest, as an equivalent for that which he received.

I do not wonder that the jury could not reconcile to themselves to give effect to a claim which on the face of the evidence was so unjust. No misdirection is complained of, or could be, for I was willing to give the demandant an opportunity, so far as depended upon me, of bringing her case under the consideration of this court in a convenient manner. I recommended to the jury to find for the demandant on all the issues, reserving leave to the defendant to move to have a verdict entered for him on the first plea, which denies the husband's seizure. The jury, however, found a general verdict for the defendant, which is certainly in accordance with the honesty of the case. If it would advance the ends of justice to set aside this verdict, which was not rendered in consequence of any misdirection, it would be right to do so, but it is no part of our duty to see that every unjust claim shall succeed. We do not sit here to compel juries to do injustice, or to give new trials upon every point of *summum jus*.

If the evidence is true, which is not contradicted by any affidavits filed on the part of the demandant, the widow's claim to dower in this land is most unreasonable and unjust, and such as a court of equity could not entertain for a moment, if the demandant were suing there, which is the more proper jurisdiction in such cases.

This action seems to have been endeavored to be supported on the idea that it had been contemplated among the devisees that this 100 acres should go to Catherine, and that as she died without issue, and intestate, the demandant's husband became seized, by inheritance, as her

elder brother; but it is impossible to vindicate the claim on that pretence, because no division was in fact made, or could legally be made, pursuant to the will, before Simon became of age, and Catherine was then dead. She never was in fact seized of this 100 acres, and John Poturff could not have inherited it from her. At the trial, witnesses were called by the plaintiff, to prove that John Poturff had always claimed this 100 acres, as his sister's share, devolved on him, which it is clear could never have been the case.

Per Cur.—Postea to defendant.

BRADFORD & CUTLER V. O'BRIEN.

Construction of receipt—as to defendant's personal liability thereon.

Held per Cur., that the following receipt—"Received of Bradford & Cutler, a note they held against A. Ladd, on which there was a balance due September 1st 1842, of \$400 33c. which is to be paid to them in Michigan treasury warrants. Also, a balance of accounts of \$57 17c. which is to be paid in current money, if enough is collected; if not, in warrants: (Signed) Dennis O'Brien"—could not be considered as containing on the face of it evidence of a promise by Mr. O'Brien personally to pay these debts.

Assumpsit on an agreement declared on in two special counts, with counts for money had and received, and on account stated.

Pleas: 1st. Non assumpsit to the whole declaration.

2nd. To the first and second counts, that the plaintiffs did not deliver to the defendant certain notes of one Alvaro Ladd or either of them, which it was averred in those counts were delivered by the plaintiffs to the defendant as the consideration on which the defendant made his promise sued on. And two other pleas demurred to, on which pleas the plaintiffs had judgment.

The declaration stated (in the first count), "That in consideration that the plaintiffs had then delivered to the said defendant a certain note which the plaintiffs then held against one A. Ladd, on which said note there was a balance due the plaintiffs by the said A. Ladd, on the 1st of September 1842, of \$400 33c. equal to 100*l.* 1*s.* 7½*d.*, and which was of the value of 100*l.* 1*s.* 7½*d.*, the defendant made his agreement in writing, by which "he promised to pay the plaintiffs the sum of 100*l.* 1*s.* 7½*d.* in Michigan treasury warrants; and also thereby promised to pay the plain-

tiffs a balance of an account which the plaintiffs then had against the said A. Ladd, of \$57 57c. equal to 14l. 8s. 10¼d. in current money, if the defendant should collect sufficient to pay the same; if not, the defendant thereby agreed to pay the plaintiffs the said 14l. 8s. 10½d. in Michigan treasury warrants."

The plaintiffs produced on the trial the defendant's receipt dated the 19th December 1842: "Received of Bradford & Cutler, a note they held against A. Ladd, on which there was a balance due September 1st 1842, of \$400 33c. *which is to be paid to them* in Michigan treasury warrants; also a balance of accounts of \$57 17c. which is to be paid in current money if enough is collected; if not, in warrants." Signed "Dennis O'Brien."

The court had this case before them in Trinity term last on demurrer to two special pleas of the defendant, which they held to be bad; and with some hesitation they held the declaration, which was excepted to on the argument, sufficient, on general demurrer; the main question being whether the declaration disclosed a sufficient consideration for the alleged assumpsit. They thought that the declaration did aver a consideration such as would make the alleged express assumpsit binding, and they referred upon this application to a case of Haigh v. Brooks (10 Ad. & Ell. 309), as strongly supporting their opinion.

The facts proved on this trial were—Ladd was attainted of high treason, being implicated in the rebellion of 1837. He died in 1842, leaving this defendant his executor. Before his death (whether sentence of death had been commuted or he had been pardoned, did not appear), Ladd removed to the state of Michigan, where he died. The plaintiffs had had dealings with him there, and at the time of his death Ladd was indebted to them. The defendant, as his executor, became possessed of some Michigan treasury warrants of Ladd's, which he paid away partly in discharge of another debt of Ladd's, and partly to these plaintiffs on account of this debt, and he was in expectation of receiving more treasury warrants from one Munroe, a debtor of Ladd's.

Under this expectation, it was alleged, he made the promise to the plaintiffs which the plaintiffs assumed was contained in the paper produced by them. Munro did not deliver the expected warrants to him; and on the defendant endeavoring, as executor, to compel him, the attainer of Ladd was set up by Munro as a defence, and defeated the executor's recovery. The plaintiffs nevertheless held him to be personally liable to them on the receipt signed by him, and sued him in this action not as executor but as being personally liable.

Besides producing the receipt on the trial, the plaintiffs called several witnesses for the purpose of proving that they had heard the defendant promise to pay this demand; but the court thought the fair effect of the evidence given by them was only that the defendant, as executor of Ladd, was excusing himself on the grounds that he had not yet received the treasury bonds which he expected, but that he hoped to do so, and would then pay.

O'Brien, in his affidavit filed on moving the rule, swore that he never had received anything on account of the estate since he gave this receipt, and that Ladd died indebted to himself in 500*l.*; that he would nevertheless have paid the plaintiffs if he could have succeeded in collecting anything; and he had before paid them 75*l.* on account, out of the warrant which he did receive. The learned judge at the trial leaned against the plaintiffs' right to recover, but directed a verdict for the plaintiffs for 39*l.* 7*s.* 5*d.*, reserving leave to the defendant to move for a nonsuit.

Hagarty obtained a rule on the leave reserved for a nonsuit, or for a new trial on the law and evidence, and for misdirection. *Duggan* shewed cause. Cases cited: 4 U. C. R. 456; 4 M. & W. 795; 5 T. R. 8; 12 Ea. R. 282.

ROBINSON, C. J., delivered the judgment of the court.

The judgment given in this court upon the demurrer, determined that, in our opinion, the written agreement declared on set out a valid legal consideration to support such a promise as the written agreement was alleged in the declaration to contain.

That was a very different question from the one now submitted to us upon the evidence—namely, whether the

plaintiffs have proved such a promise as they declared upon, and which the defendant denied by his plea of non-assumpsit. In both the special counts, the plaintiffs expressly charge that by the written agreement stated the defendant promised to pay the plaintiffs the sum of 100*l.* 1*s.* 7½*d.* in treasury warrants.

Now there is no other written agreement than that which may be imported from the receipt—the terms of which have been already stated. We do not think that the receipt contains any such promise as the declaration sets out. The plaintiffs have, in our opinion, taken the liberty of extending it not merely beyond its words, but beyond its import and legal effect. “Received of Bradford & Cutler, a note they held against A. Ladd, on which there was a balance due on September 1st 1842, of \$400 33*c.* *which is to be paid to them in Michigan treasury warrants*”—is not the same thing in effect as “*which I promise to pay in Michigan treasury warrants ;*” and the same remark applies to the words of the receipt which relate to the smaller sums mentioned in it. Looking merely at the receipt (and we are not at liberty to look out of it), we cannot say that the words “*which is to be paid in treasury warrants*” mean anything more than a description of the obligation which the note imported—in other words, that the note spoken of was not a note payable in money, but payable in Michigan treasury warrants—or at least that the amount was in fact so payable by agreement between the parties to the contract, whether so expressed in the contract or not. If this defendant O’Brien, instead of being executor to Ladd, had been an attorney with whom these plaintiffs proposed to leave the note for collection, they might be expected to have taken just such a receipt as was given in this case, without its being intended on the one side or understood on the other, that the attorney was assuming any liability as to paying the money, or that he meant anything more than to acknowledge that a paper such as the receipt described had been deposited in his hands, and for the safe keeping of which he would of course be responsible.

It does not seem reasonable to suppose that the attorney

in the one case, or the executor in the other, could mean anything more; for why should either of them incur a personal liability for the debt contracted by the maker of the note. As regarded the executor, there might be a reason for it, arising from his desire to prevent a sacrifice of some property of the estate, or from his having himself misapplied the assets; but nothing of the kind is shewn here, nor was I think pretended; and we are left to gather the meaning of the receipt from the words used in it. If A. should sign a paper acknowledging that he had received from B. a note made by C. payable to B. in stock, we should never infer from that that A. was binding *himself*, but merely that he was stating the nature of the note which B. had delivered to him. Then can we say that there is such a difference between the words "payable in" or "which is to be paid in," as that we should be warranted in inferring from the latter a personal undertaking by the signer of the receipt, though we could not do so from the former? We think we cannot say so.

The case of *Brooks v. Elkins* (2 M. & W. 74), may be thought applicable to this question; but it is not. The point there was, whether 100 *to be paid* on the 22nd instant," was a promise by the maker to pay on the 22nd instant, and so requiring a stamp as a promissory note. The court held that it certainly required a stamp, because if it was not a promissory note it was a special agreement to pay a sum beyond 10*l.* and in that character would require a stamp. They treated it then, at all events, as binding the signer of the paper to pay. Of course it could not but be so regarded; for where the person who signed the paper began by acknowledging that he owed the 20*l.* and added "*to be paid* on the 22nd instant", he could be taken to mean nothing else than that *he* would then pay, for there was no one else to pay it.

The case before us is very different; here the signer of the receipt is describing another paper signed by another party, who did by it promise to pay—and, as I think we should infer from the words of the receipt, undertook only to pay in a particular manner. We cannot safely, I think,

place any other construction upon the receipt; and if we were at liberty to look out of the paper in order to discover its meaning, then the other evidence given in the cause is such as plainly shews, I think, that what we understand by the receipt is what the defendant must have meant when he gave it. Mr. Bradford, one of the plaintiffs, in his letter to his attorney dated the 11th of April 1848, which was read at the trial, gives an account of the whole course of the transactions between him and his partner on the one side and Mr. Ladd on the other, and he distinctly states that it had been agreed between them that Mr. Ladd was to pay in Michigan government scrip and not in money, except as regarded the farther sum of \$57. This accounts for the expression in the receipt "*to be paid in Michigan treasury warrants*;" for it is clear from Mr. Bradford's letter, that that really was the nature of the contract between the plaintiffs and Ladd. The note itself does not seem to have been produced at the trial, and we do not see whether this qualification was expressed in the note or not. Since that was the agreement between the parties, it is reasonable to suppose that the note was in those terms; and if it were not, still the receipt merely stated the truth that the \$400 was to be paid in treasury warrants, without giving us to understand anything else than that Mr. Ladd had engaged so to pay the account.

We have considered whether the latter part of the receipt respecting the \$57 should induce us to put a different construction on the paper. It runs thus: "also a balance of account of \$57 33, which is to be paid in current money, *if enough is collected*; if not, in warrants;" but we do not think we are authorized to read that, any more than the other, as a promise of this defendant to pay.

We can see plainly, from Mr. Bradford's own account of the transaction, how that expression came to be used. He says Ladd was to pay that small sum in cash, but not the other sum; and when the plaintiffs were taking this receipt, they probably wished the footing on which they stood as to that part of their demand to be differently described—that is, that they were entitled to look to the estate, (not to the

executor personally) for payment of that small sum in money; and were content, I suppose, to add, if sufficient money can be collected on account of the estate.

On the whole, it is our opinion that the plaintiff should have been nonsuited, for that the receipt does not bear on the face of it evidence of a promise by the defendant personally to pay these debts.

Per Cur.—Rule for nonsuit absolute.

VAIL V. DUGGAN ET AL.

Liability of an Attorney for not urging an unconscientious defence.—Liability of party to refund money received under an agreement, void as made on a Sunday.

A declaration against an attorney for negligence, is sufficient in stating generally, that by the negligence of the defendants he (the plaintiff) lost his cause—it need not point out what the negligence consisted in.

Semble, that an attorney would not be liable for culpable negligence, in not urging for his client, the defence, that the agreement upon which he was sued was made on a Sunday, as it is no part of his professional duty to take all dishonest advantages.

Where A. had received money upon an agreement, to deliver timber to B. and afterwards refused to deliver the timber, and was sued by B. to recover the money back, it is no defence to such an action to shew the agreement made on a Sunday, and therefore void—under an act, 8 Vic. ch. 45: for if void, that would be no reason why the money received under it should not be refunded.

The plaintiff complained of the defendant's, Messrs. Duggan and Holden, attornies of this court: "For that whereas an action was depending in the district court of the District of Gore, at the suit of Read and McAlister, against the now plaintiff, and that these defendant's being retained by the plaintiff to manage his defence, promised to use due care and diligence, but that they disregarded their promise in this, viz., that they did not use due care or diligence in managing and conducting the defence, but conducted the same in so careless, unskilful, and improper a manner, that by reason thereof the said defence failed, and was rendered futile; and the said Read and McAlister recovered judgment for a large sum, to wit, 50*l.*, and afterwards sued out an execution upon the judgment against the (now) plaintiff, who was forced to pay, and actually did pay the sum so recovered, and also 10*l.*, being the expenses of, and occasioned by the said execution; and that plaintiff also paid, and became subject to divers costs and expenses, viz.: 20*l.* in attempting to defend the said

action, and was put to other inconveniences and expenses, to the plaintiffs damage of 100*l*."

The defendant's pleaded: 1st. *Non assumpsit*.

2nd. That they did use due care, skill, or dilligence, in managing or conducting the defence to the said action, &c.

The plaintiff, Vail, had entered into a written agreement with Read and McAlister, to deliver to them a certain quantity of timber, at certain prices. He received from them small advances to enable him to proceed, amounting in all to 21*l*.; but when he had got out the timber, or some of it, and before any part of it was delivered, they disputed about the manner in which it was to be measured, and Vail finally refused to let Read and McAlister have any of the timber. They then brought an action against him in the district court of the District of Gore, on the common money counts, to recover back the money which they had advanced to him. He employed these defendants, Duggan and Holden, as his attornies, to defend him. Upon the trial in the district court, the counsel for Vail, who was Mr. Holden, one of his attornies, took the legal exception that the written agreement between the parties had been entered into on a Sunday, and was therefore void under the provisions of our statute 8 Vic. ch. 45, sec. 2. That objection was, for the time, overruled, and Read and McAlister got a verdict for 21*l*., the money which they had advanced to Vail; but leave was reserved to Vail, to move in the District Court, in term, for a nonsuit upon the legal objection, if he thought fit.

No such motion was made, and the verdict went into effect. There was evidence, that Vail being anxious about his cause, had inquired of Mr. Holden, one of the defendants, what had been done in regard to moving for the nonsuit, and that Mr. Holden told him that he had moved and had not succeeded. The fact being that a motion for nonsuit was not moved in term, in the district court, on the leave reserved, Vail brought the present action against his attornies, Duggan and Holden, for negligence.

His declaration was framed in the general terms stated. Verdict for plaintiff, 50*l*.

Cameron, Q. C., obtained a rule for a new trial on the law and evidence, and for misdirection—or, that judgment be arrested. *Crooks* shewed cause.

Cases cited : *Chitty on Contracts*, 560 ; 7 B. & C. 596 ; 9 Bing. 287 ; 2 Cr. & J. 590 ; 3 B. & C. 799.

ROBINSON, C. J., delivered the judgment of the court.

The declaration seemed vague and indefinite, in not pointing out what the negligence consisted in, but appearing to rest the case upon the negligence being apparent from the mere fact that the plaintiff lost his cause. It contains no assertion that he had a good defence, which could have been made out at the trial, and would have entitled him to succeed : he says only, that the defendants so negligently and unskillfully managed his case, that by reason thereof his defence failed.

We find, however, this general form of declaring is sanctioned by precedent, and it is left to the party complaining to shew, for the first time, by evidence on the trial, in what the unskillfulness or negligence consisted. The judgment, therefore, we think, should not be arrested on that ground, nor on the other ground pointed out in the argument of this rule—namely, that in one part of the count, the defendants are charged as being attornies of the *district court*, which it is contended they cannot properly be called, being sworn and admitted attornies of this court only. They were the attornies of the plaintiff of record, in the action in the district court, and it is sufficiently certain what was intended.

As to the motion for a new trial on the law and evidence : The verdict for 50*l.* damages, was not satisfactory to the learned judge who tried the cause, and it appears to us to be very unreasonable. The plaintiff had kept all the timber he made, and wished also to keep the money which had been advanced to him on account of it. The grounds on which he had withheld the timber from the persons for whom he made it, or the grounds at least on which he rested his refusal at the trial, were fully investigated in the suit in the district court, and not being found to excuse him, he was properly compelled to refund the money he had received, and nothing more. He should have done that

without the compulsion of an action, and his being made to return the money, as he kept the timber, cannot be considered as doing him any wrong. The only damage he could complain of was, that he did not succeed, as he supposed he might have done in a defence, which, if it had been held legal, could certainly not have been held just, but on the contrary, very much against good faith. I refer to the objection which his counsel took at the trial, and which the plaintiff complains was not renewed in term, owing to the neglect of his attorney. That was, that the written agreement about the timber, between him and Read and McAlister, was made on a Sunday, and was therefore void under the statute. Whether that objection, which is one that must be dealt with on strict principles of construction of a penal statute, was entitled to prevail, we could not say certainly, without seeing the agreement. The doubt which appears to have been entertained upon it was, whether it came within the prohibition of "buying and selling, or an agreement to buy or sell." The agreement and the circumstances may have been such, as to raise a doubt upon that. We cannot tell ; for although this case has, for some reason of convenience to the parties, been delayed to be argued till this term, we have not been able to get the agreement that was in evidence at the trial, nor a copy of the Judge's notes of the trial in the district court, which seems to have been given in evidence on the trial of the present action. But this at least is clear, that the objection of which this plaintiff desired to avail himself was not a conscientious one ; for after he had acted upon the agreement, and received Messrs. Read and McAlister's money upon it, he ought not to have availed himself of the pretence that the agreement on which they had acted was void, and endeavored by that means to leave the parties, with whom he had contracted, without any remedy.

I should be sorry to find it maintained in a court of justice, that an attorney was guilty of culpable negligence in not putting forward such a defence ; he might well decline to do so, and as I think, safely, on the ground that it is not a part of his professional duty to take all dishonest advantages.

If Mr. Holden did, indeed, lead the plaintiff to suppose, that he would rely upon the objection, and that it would carry him through, and thus encourage the plaintiff to incur costs; then there would be a reasonable ground of complaint, perhaps, that Vail had been led into expense by a defence suggested to him by the attorney, and abandoned when the proper time came for maintaining it. The real loss to the client, however, could only be the amount of the costs, for it could never, in a court of justice, be recognized as a substantial damage to him that he had been obliged to refund the advances he had received.

Why the jury should have allowed 50*l.*, it is difficult to understand. It seems, certainly, an unreasonable verdict in amount. But the obvious objection to the verdict is, that the plaintiff has really sustained no injury, by what he complains of in this action as negligence; for if the agreement had been held void on the trial in the district court, on account of its being made on a Sunday, then the plaintiffs would have had a clear right to get back the money, as being paid on a consideration which had failed. The utmost effect of the statute, if the case were held to come within it, would be to deprive the parties of their advantage of suing upon it. They could not enforce the agreement, or make use of it—but the principle of *pari delicto* would not apply to prevent the recovery of the money, when the plaintiff refused to deliver the timber, for there was nothing illegal but the making the agreement—the timber was not to be made on Sunday—there was nothing contrary to law or public policy in the consideration for which the money was paid, and no reason therefore why it should not be refunded.

On this ground, that it seems not to have been considered on the trial of this cause that the objection, if it had been allowed, could not have saved the defendant from refunding the money which he had received, and therefore that he lost nothing by its not being further urged, we feel it necessary to set aside the verdict, and grant a new trial—the costs to abide the event.

Per Cur.—New trial—costs to abide the event.

PROUDFOOT V. ANDERSON.

Delivery orders for wheat in warehouses—their nature and effect—liability of seller to purchaser of wheat, upon warehouseman actually refusing to deliver.

Where A., having 217 bushels of wheat, stored in B.'s warehouse, gave C., who had paid the price of the wheat, a delivery order upon the warehouseman B., and B., upon the delivery order being presented, refused to deliver the wheat to C., until he (the warehouseman) had been previously satisfied a demand of his own, against C., wholly unconnected with the transaction between A. and C. *Held, per Cur.*—That upon such refusal, C., could sustain an action against A., for the non-delivery of the wheat, the delivery order, when given to the purchaser, not being an actual delivery of the wheat, but merely an evidence in the hand of the seller, that he had the wheat in B.'s warehouse, and, in the hand of the purchaser, that he had the right to demand the wheat from B.

Assumpsit for not delivering 217 bushels of wheat, bought by the plaintiff of the defendant. The contract was specially declared on, in three counts, and common counts were added, for money had and received, &c.

The plaintiff in the first count declared, that on the 1st of November, 1849, the plaintiff, at the request of the defendant, bargained with the defendant to buy of him, and that the defendant then sold the plaintiff a certain quantity of wheat, for a certain price, which the plaintiff then paid for the same, to be delivered by the defendant to the plaintiff at the store of one Harris in Oakville, on request to be made at the said storehouse: and that the defendant then promised the plaintiff, in consideration of the price so paid him, to deliver the said wheat to the plaintiff, at the said storehouse, upon the plaintiff's request, within a reasonable time in that behalf; and the plaintiff averred, that he did, within a reasonable time, request the defendant to deliver the said wheat at the said storehouse, and attended there to receive it, of which the defendant had notice, but that the defendant did not deliver the said wheat then or at any time since.

The defendant, besides two pleas demurred to, pleaded non assumpsit. 2. A plea, denying request. 3. A plea, denying notice. 4. That he did deliver the wheat.

The facts were, that the defendant, a farmer, had delivered at the storehouse of Harris, in Oakville, at different times, 217 bushels of wheat, taking a receipt, as is usual, for each load; which receipts expressed that Harris had received in store from Anderson the quantities of wheat

respectively mentioned in them, *for himself*, (Anderson). The plaintiff, as a merchant, was buying wheat about that time, (November 1847), and the defendant having given to one Brooke, to whom he was indebted, the different receipts for the 217 bushels, with permission to sell the wheat, and account to him, the defendant, for the proceeds, a clerk of the plaintiff's met Brooke, and bought the wheat from him at 3s. 8½*d.*, per bushel, paying him the whole price in cash, and taking from him the printed receipts, which he held, and which were not endorsed by Anderson, or any one. The plaintiff's clerk knew that there was a vessel of the plaintiff's waiting for cargo, and asked Brooke whether the wheat was in Harris's storehouse, and whether he could get it when he called, and was told by Brooke it was there, and that he could get it when he called. The clerk soon after presented the receipts to Harris, who looked at them, and said he would not deliver a bushel of it, until the plaintiff paid him some demand which he said he had against him for flour on some previous dealing, unconnected with this transaction.

The defendant was informed of this refusal; but, though he kept the plaintiff's money which he had received, he declined to interfere, saying, that he had seen Harris, who requested him to have nothing to do with it, and not to take back the receipts, but to leave the plaintiff to settle with *him*. The defendant, in answer to a demand at another time made to him for the wheat, said he cared nothing about it, for he had got his money, and the plaintiff might look to Harris; and he refused to give any written order to Harris to deliver the wheat.

It was contended for the defendant, that the moment Mr. Harris told the plaintiff's clerk, that he would keep the wheat, till he was paid his demand on the plaintiff, on some other account, he thereby recognized the plaintiff as the owner of the wheat—that the sale and delivery by Anderson was complete—and that the plaintiff had no remedy but against Harris. The Chief Justice overruled a motion for nonsuit, on that ground, and the plaintiff received a verdict for 42*l.* 6*s.* 10*d.*, damages.

A. Wilson obtained a rule for a new trial, on the law and evidence, and for misdirection. He cited—2 Man. & Gr. 650; 13 M. & W. 481; 7 Man. & Gr. 360; 5 B. & C. 287; 2 Campb. 243; 3 B. & P. 582; 2 Man. & Gr. 811, 792; 4 Man & Gr. 1080; 4 Tyr. 290; 6 B. & C. 360, 388; 7 Taunt. 278; 5 B. & Ad. 513; 10 Bing. 246; 3 Campb. 344; 11 Ea. R. 217; 12 Ea. A. 514; 1 Ea. R. 193; 1 Taunt. 158; 12 Ea. R. 619, 621; 5 B. & C. 864; Noys' Maxims, 88; 6 B. & C. 362; 7 Taunt. 286; 2 M. & Sel. 403.

S. Jarvis shewed cause. He cited—1 Esp. C. 598; 5 D. & R. 286; 3 B. & C. 426; 16 M. & W. 120; 13 Jurist 265.

ROBINSON, C. J., delivered the judgment of the court.

The justice of this case is too plain to admit of any doubt. As soon as the defendant learned that his agent, with whom his wheat was stored, refused to give it to his vendee; or which is the same thing, refused to deliver it, except on certain terms of his own, which had no reference to the property, or to the transaction between the plaintiff and the defendant, he should have returned to his vendee the price that he had received, or compelled his agent to deliver the wheat. How he could imagine that he was bound to do neither, I do not understand.

That the law of the case is clearly with the plaintiff, will be seen by reference to the cases of *Searle v. Keeves*, 2 Esp. C. 598; *Bentall v. Burn*, 5 D. & R. 285, and reported also in 3 B. & C. 426; *Farina v. Home*, 16 M. & W. 120; and *McEwan v. Smith*, determined in the House of Lords, 13 Jurist 265.

I consider the case the same precisely as if the plaintiff in person had had with the defendant in person the transaction which passed between their respective agents. I consider, also, that what the plaintiff bought was the defendant's 217 bushels of wheat, which his agent stated to be stored in Harris's warehouse, subject to his order, and not the printed receipts merely, which were not endorsed, and not negotiable, even in the sense that bills of lading are. They were mere evidences in the defendant's hands that he had the wheat there, and when his agent handed

them over to the plaintiff, or his clerk, on being paid for the wheat, the effect was the same as if he had given a delivery order to Harris to let the plaintiff have it. They sufficed to shew the plaintiff's right to demand the wheat. I only assume that they could do that—they could do no more; but the handing over the receipts, did not amount to an actual delivery of the wheat—if it might, for some purposes, amount to a constructive delivery, where the vendee had met with no obstruction.

In *Searle v. Keeves*, the action in a similar case was brought, as it is here, for the non-delivery; the price had not been paid, nor any earnest given; and as the vendee could not get the goods, though the warehouseman at first made no objection, it was objected, that there was no delivery and acceptance of the goods, and so nothing to take the case out of the Statute of Frauds. But *Eyre, C. J.*, ruled that there had been, by the delivery of the order on the warehouseman, a constructive delivery of the goods, sufficient to satisfy the statute; and that the plaintiffs could, therefore, recover against the vendor for withholding the actual delivery. This shews, plainly, the difference between constructive and actual delivery, if that case is good authority for holding that there was even a constructive possession; which may be doubted.

It is for the want of the actual delivery here of that which was paid for, that the plaintiff is suing, as he was suing in that case; and, there is no difficulty here about the Statute of Frauds, for the whole was actually paid.

In *Bentall v. Burn*, the vendee had bought of the vendor a hogshead of wine, which was stored in the London docks, and the vendor gave him an order to receive it, and afterwards sued him for the price: the vendee defended himself by shewing that when he went to the docks he was not permitted to taste the wine—that it had not been transferred to him within the proper period—and that he had thereby lost the opportunity of reselling it. He had afterwards, also, (as it seems), lost the delivery order. He declined on these grounds paying for it, and the plaintiff was nonsuited on the trial. Every word of the judgment,

given afterwards in banc, when the case was argued on a motion against the nonsuit, applies to the present case.

“It appeared upon the evidence,” Lord Tenterden said, “that the defendant had not been allowed access to the wine, even for the purpose of tasting it; but if he had, he certainly never had the absolute possession of it. He never could have *accepted* the wine until the dock company had accepted the delivery order, and by so doing consented to become the agents of the defendant, as the buyer. They held in the first instance as the sellers agents, and the property could not be changed, while they continued so to hold it. If the company did, in this case, improperly refuse to transfer the goods, it follows that there could be no acceptance of them by the buyer, until he obtained the actual possession of them, which he never did. The delivery order, his lordship said, was useless, until it was accepted by persons who might, by possibility, refuse to accept it.” The nonsuit was therefore confirmed, on the ground that the vendor not having delivered the goods there was nothing to take the case out of the statute.

In *Farina v. Horne*, the Court of Exchequer had at first intimated, that the retaining by the vendee of the delivery warrant, was some evidence of his acceptance of the goods; but, having deliberated on the case, they admitted that the counsel who had maintained the contrary was right. “He contended,” they say, “that it was no evidence of *the actual receipt of the goods, that is of the delivery* of the possession of the goods on behalf of the vendor to the vendee, and the receipt of the possession by the vendee; and that the receipt and delivery of the warrant was not in effect the same thing as the delivery and receipt of the goods. And we are all, (the court says), of that opinion.”

In the case of *McEwan v. Smith*, the whole nature and operation of delivery orders is much discussed, and all that is said in the case, is against what this defendant most unreasonably, contends for.

When the warehouseman, Mr. Harris, said he would give up none of the wheat till the plaintiff settled his own accounts with him, he said the same thing in effect as that

he had the wheat and meant to keep it ; for, by attaching a condition to the delivery, which he had no right as the agent of Anderson to impose, he did the same thing as refusing absolutely ; and the defendant should have seen that he gave up that absurd line of conduct, or should have restored to the plaintiff his money. If the wheat had been destroyed by fire or otherwise, after Harris declined to let the vendee have it, the loss would have been his own, or Anderson's, not the loss of the vendee.

But there was no use in the jury perplexing themselves with the question, at whose risque the wheat was, at any given time, for that would depend on various circumstances ; and the determination of that point might or might not govern the question of liability for withholding an actual delivery, as between vendor and vendee. The case, in all its circumstances, is too plain, we think, to admit of any uncertainty.

The cases cited for the defendant on the argument, are none of them inconsistent with those on which our judgment is founded : they do not properly apply to the question before us.

Per Cur.—Rule discharged.

SLATTERY V. TURNEY ET AL.

An attachment issuing against the payee of a note—an absconding debtor—its effect on his right to sue maker on his return.

The payee of two promissory notes for 25*l.* each, having absconded, is not thereby disabled from suing the maker upon them on his return to the province ; because, in his absence, an attachment had been taken out against him by A. B., a creditor, for 21*l.*

The plaintiff sued the defendants as makers of two promissory notes, given in March, 1839, to the plaintiff or order—payable, the one in three years, and the other in four years after date ; also, on the common count on an account stated.

The defendants pleaded, that in April, 1841, the plaintiff became an absconding debtor ; that one Johnson sued out an attachment against him, from the district court of the district of Bathurst, for 21*l.* 8*s.* 6*d.* ; that this plaintiff then

held the two notes now sued on; that the sheriff to whom the attachment was directed, before the return thereof, and before the commencement of this suit, published the notice in the Gazette, required by the absconding debtors' act; that the plaintiff did not return to the province, and put in bail within the three months, nor satisfy the claim of Johnson; that the defendants in this suit were duly served with a copy of the said notice published in the Gazette, according to the ninth section of the act; and, that the defendants were thereby, and still are, deterred, prevented and prohibited from paying the monies in the declaration mentioned, to any other person than Johnson; that Johnson continued to prosecute his suit upon the attachment against the property and effects of the plaintiff; and that his suit from thence, and until, and at the time of the commencement of this action, was pending in the said district court.

To this the plaintiff replied that before the commencement of this suit, to wit, on the 1st of January, 1839, he returned within the jurisdiction of the district court, and hath ever since remained therein; and that afterwards, while the suit of Johnson against this plaintiff was pending, and before judgment had thereon, he, Johnson, died, whereby the suit became abated and determined; and, that no other writ of attachment than that mentioned in the plea, and no other proceedings than those at the suit of Johnson, which have been so determined, have been had or prosecuted against the plaintiff, as an absconding and concealed debtor.

The defendant demurred to this replication: assigning as causes, that it was double, that it gave no sufficient answer to the plea, and that it raised immaterial issues.

Eccles, for the demurrer. *Strong*, contra. Cases cited: 4 C. B. R. 562, 274; 1 Exch. 107; 2 G. & D. 225.

ROBINSON, C. J., delivered the judgment of the court.

There are two notes sued upon of 25*l.* each, independently of any demand which might be urged in addition, under the common counts; and the first substantial question is, whether the payee of these notes, having absconded, is disabled from suing upon them on his return to the province,

because, in his absence, an attachment had been taken out against him by Johnson, as creditor for 21*l.* 8*s.* 6*d.*, there being no appearance of any other demand against him, and Johnson's alleged debt not being sufficient to cover the amount of one of these notes.

It is not shewn that the notes were ever actually seized under the attachment, or were within the district, while the attachment was in force. If they were, it might be contended that they were in the custody of the law; but that, I apprehend, would not prevent an action being brought in the name of the payee, upon them. The principle would seem to apply, which has been established in respect to goods, bound by the delivery of a writ of *fieri facias*, to the sheriff. The debtor does not lose his disposing power over them, so that any assignment he may attempt to make is necessarily inoperative; he only loses the power of making any disposition of the goods to the prejudice of the judgment creditor, whose writ is in the sheriff's hands. Upon any question between such a creditor and the assignee, the execution will prevail against the assignment till the creditor's debt is satisfied. It would be unjust, that a trifling debt of a few pounds should necessarily suspend all proceedings upon securities held by the debtor, alleged to have absconded, which might be an hundred-fold greater in amount.

I do not think that, upon what the plea shews, the plaintiff is legally disabled from recovering in respect of either of the notes, because a creditor has sued out an attachment against the payee for a less amount than one of the notes. If the makers of the notes are able to pay 21*l.*, the full amount of that debt can be had by enforcing payment of one of the notes. If they have not effects to pay one note, the creditor would have no object in attempting to retain his claim upon the other.

But at all events, I conceive, so soon as the claim of the attaching creditor under the writ lost its force, there could remain no impediment to the payee of these notes pursuing his remedy upon them. They are not shewn to have been ever actually in the custody of the law, by being either seized by the sheriff, or by being within the influence of the

process. By the death of Johnson the action at his suit, for all that appears, abated. It is averred that he died before judgment, and the defendants themselves say that his suit is pending, which implies that judgment had not been obtained in it. The attachment had issued about 8 years before this action was brought, and it is not shewn that a verdict had been obtained, or interlocutory judgment signed before Johnson's death. In my opinion, we cannot hold that the plea sets up a sufficient bar to the action; and it is therefore not material to consider whether the replication must have been bad on either of the grounds taken. I do not see that it is.

The defendant does not point out in his demurrer, as he should have done, in what the duplicity consists; he does not shew what he takes to be the two defences relied upon, and I do not think we can properly say, that the plaintiff has given two separate answers to the plea. He avers in substance, that after the attachment he returned to the district, and is now living within the jurisdiction, ready to answer Johnson's suit, if it could, in the nature of things, be further proceeded in, but that it cannot, which the plaintiff probably supposed it might be proper to state, in order to relieve him from the necessity of giving security under the 5th clause of the statute. The plaintiff, in our opinion, is entitled to judgment on this demurrer.

Per Cur.—Judgment for plaintiff on demurrer.

DOE DEM. CROOKS V. TEN EYCK.

DOE DEM. CROOKS V. CALDER.

Township of Binbrook—erroneous survey—acts 1 Wm. IV. ch. 8, 7 Wm. IV. ch. 59, remedying same—married woman owning land in Binbrook.

Under the statutes 1 Wm. IV. ch. 8, and 7 Wm. IV. ch. 59, passed for the purpose of remedying an erroneous public survey—an inhabitant living in the front concession of the township of Binbrook, cannot be dispossessed by an ejectment brought, after a prior submission to arbitration, by the husband of a married woman, owning land in the adjacent township of Saltfleet—the husband not being the owner of the land—to whom alone these acts apply.

In each of these cases the action was brought for land in the 1st concession of Binbrook, and a verdict was rendered for the defendant, leave being reserved by consent at the

trial, to move this court to enter a verdict for the plaintiff, upon the evidence.

By the statute 1 Wm. IV. ch. 8, after reciting that the inhabitants living in the front concession of Binbrook had made improvements, and erected buildings on the front of the said first concession, in accordance with a line run by Mr. Wilmot, a deputy provincial surveyor, employed by the government, which line had been since found to be erroneous, encroaching on the eighth concession line, or rear boundary of Saltfleet; and that the said persons, whose improvements were thus found to have been made by error on lands in the 8th concession of Saltfleet, which were supposed to form part of the first concession of Binbrook, not having encroached knowingly, or with any wrong intention, it was expedient to make provision by law for settling the difficulties likely to arise in consequence of such error, it was enacted that the proprietors of lots in the 8th concession of Saltfleet, on which improvements may have been made by persons who supposed the land to form part of Binbrook, shall not have power to dispossess the persons who have so improved, until an arbitration has been resorted to for settling the matter in dispute between them; and, the statute provides, that where the parties cannot agree between themselves, each party shall choose an arbitrator, and the two arbitrators shall choose a third, and the three shall have full power to determine the matter in difference; that they shall assess the value of the improvements and the value of the land in an improved state, and the owner of the land shall have the option whether he will retain the land, and pay for the improvements, or accept the assessed value of the land (without improvement); and the award may be made a rule of the Court of King's Bench.

In 7 Wm. IV., another act was passed, ch. 59, which recites that the former act was defective, in not making provision for cases in which the persons who had erroneously improved on lands in Saltfleet should refuse to arbitrate, and yet keep possession of the land; and, it provides, that whenever any such person, having three months' notice to appoint an arbitrator, shall refuse or neglect to do

so, the judge of the district court may nominate an arbitrator on his behalf.

It was proved that on the 24th of May, 1809, the crown granted by patent lots No. 14 and 15, in the 8th concession of Saltfleet, to Mrs. Jane Crooks, wife of James Crooks, Esq., and daughter of Thomas Cummings, Esq., an U. E. Loyalist. The land in question, in the action against Ten Eyck, was claimed by Mr. Crooks, the lessor of the plaintiff, in the right of his wife, as being part of lot 14, mentioned in the patent.

An award was produced and proved, made on the 30th October, 1847, under the statute, whereby the arbitrators chosen, as the act 1, Wm. IV. ch. 8, directs, awarded that they had found this defendant, (Francis Ten Eyck), to have improved upon 6 acres, 2 roods and $11\frac{1}{4}$ perches of the plaintiff's land, being lot 14, 8th Saltfleet; they awarded also, that this land in its uncultivated state would be worth 14*l.* 15*s.* 8*d.*, being at the rate of 2*l.* 5*s.* 0*d.* per acre, and that the value of the improvements was 31*l.* 4*s.* 2*d.*

It was proved that this award had been made a rule of court, and that the lessor of the plaintiff, had served the defendant Ten Eyck with copies of the award and rule of court, and had demanded in a formal manner, by his attorney properly authorized, the 14*l.* 15*s.* 8*d.*, being the assessed value of his land encroached upon, and that the defendant refused to pay the same, until he received a deed for the land.

The statute contains nothing express upon the subject of the conveyance of the land, to the person willing to retain the land, and pay the assessed value. The price being refused, the plaintiff brought this ejectment to recover the land.

It was objected on the part of the defendant at the trial, that the lessor of the plaintiff should have tendered a deed of the land; and that he alone could not make a title to the fee, having only a temporary right to the possession in right of his wife.

The defendant also set up a defence under the Statute of Limitations. He proved that a patent had issued on 26th

April, 1819, to one Thomas Condon, for the north $\frac{1}{2}$ of 3, in block 1 in Binbrook; that he made improvement on the land, and lived on it, and sold it to one Smith, who also lived on it till he sold it to one Bryan Condon, by whose heir it was sold to Ten Eyck, this defendant, and that for more than thirty five years, this land has been continually occupied by the several claimants under these titles.

The Chief Justice directed, on this evidence, a verdict for the defendant, reserving leave to the plaintiff to move to have a verdict entered for him, if the court should be of opinion, that upon the evidence any good ground appeared for holding that the plaintiff was not bound by the Statute of Limitations.

Crooks obtained a rule to have a verdict entered for the plaintiff, upon leave reserved. *Hector* shewed cause.

The statutes 1 Wm. IV. ch. 8, and 7 Wm. IV. ch. 59, were referred to.

ROBINSON, C. J., delivered the judgment of the court.

It did not strike me at the trial that the plaintiff could be held not to be barred, being in a condition, as it appears to me, to establish his right and sue for his land more than twenty years ago, for the statute 1 Wm. IV. ch. 8, conferred no new right. The owners of land in Saltfleet, up to the time of passing that act, could have brought their actions, though it is true, that from that time till the passing of the act 7 Wm. IV. ch. 59, their action was suspended, and without their power to remedy it, if the other party should decline concurring in the appointment of arbitrators.

This state of things between these parties, presents several questions. It is clear that what the legislature meant by passing the statute 1 Wm. IV. ch. 8, was to protect the patentees of lands in Binbrook from being dispossessed of lands in Saltfleet of which they had ignorantly taken possession, until they should be paid for their improvements, because they had been misled by an erroneous public survey, and had reason to believe that the land was covered by their patents—but there are several defects in the statute.

Mr. Crooks, the lessor of the plaintiff, is not the owner of

the land in question, but is only seized in right of his wife. The statute makes no provision for the case of married women being proprietors of lands in Saltfleet, while all its enactments apply only to the persons *owning the lands*.

It is the owner of land only who is to submit to arbitration, "in case he and the proprietor of adjacent land in Binbrook, who has unknowingly trespassed upon him, *cannot settle the matter in dispute between themselves*." Now, Mr. Crooks could not, by any act of his own, have made a settlement of the disputed boundary, which would have bound his wife or her heirs; and, as the act only proposes an arbitration, in default of such agreement, it is to be inferred that the legislature contemplated a submission to arbitration by such person only as could have bound the title by his acts—in other words, by the owner, where no special provision beyond that is made. The 3rd clause enacts, that the owner may submit to arbitration—it goes no further; and the 6th clause provides, that it shall be optional with the owner of the land to pay the assessed value of the improvements, and keep his land, or to receive the assessed value of his land; in which latter case, it must have been intended, though it is not so expressed, that the land should become the property of the other party: but the act neither provides that it shall, nor contains any direction that the land shall be conveyed to the person from whom the assessed price has been accepted.

We consider, in the absence of anything express in the act on that point, that the title must be treated as being bound by the option declared, that the effect of the proceeding would be to constitute a sort of parliamentary conveyance, and at least, that the former owner could not afterwards sustain an ejectment to dispossess the party from whom he received the price of the land, or any one claiming under him.

But the difficulty here is, that the owner of the land has not submitted to arbitration; no award has been made that binds her title, and she has not yet declared an option, if she is legally competent to do so. Then this stands as a case where the statute has not been legally acted upon, as

regards arbitration, and in which, consequently, the owner cannot maintain ejectment, nor any one in right of the owner, until a binding arbitration has taken place, such being the effect of the statute 1 Wm. IV. ch. 8.

The consequence is, that the rule which has been obtained for entering a verdict for the plaintiff must be discharged; not, however, on the ground that the plaintiff is barred by the Statute of Limitation, for that question is not decided.

This case suggests the necessity of some legislative amendment of the act 1 Wm. IV. ch. 8, as regards the case of married women; also, as to the effect of that statute in restraining possession—in suspending the operation of the Statute of Limitations, and the evidence of title to be furnished to the occupant when he pays the price of the land; and it might in some other respects be made plainer.

Per Cur.—Rule discharged.

GILPIN v. GREENE.

Proposed joint stock adventure—where a party paying in on account may recover back his money, as for a failure in forming the company.

A party contributing to some joint stock adventure, which does not go into effect, may be allowed to recover back his money, in an action for money had and received; but the court must, in each case, see the circumstances which give him a just right to reclaim his money. The court held, that in this case no such right was shewn.

Evidence of a conversation prior to the execution of a written agreement, cannot be received to alter its terms.

Assumpsit on the common counts for money lent, money paid, money had and received, and on account stated.

Plea: non assumpsit.

On the 24th of March, 1848, the plaintiff and the defendant entered into a sealed agreement, in which it was recited, that it had been agreed to establish a line of steam boats, to run during the ensuing and subsequent seasons from Hamilton, in Upper Canada, to Montreal, and that there was then being built at St. Catherines a vessel to be called the *Hibernia*, which, when completed, was to form one of the line; that they, the now plaintiff and defendant, “had agreed to become co-partners in the said vessel, and in all the business of common carriers to be conducted and carried on in her, in the proportions and manner therein

mentioned, and that the plaintiff Gilpin, was to be master thereof, at the yearly salary therein also mentioned, besides his share of the profits which might become due to him on the amount of his stock in the said boat." And it was also recited, that in part payment of Gilpin's share of the stock in the vessel, he had paid to Greene 311*l.* 15*s.* 0*d.*; and had agreed to pay the remainder of the amount due, or to be due on the said stock, according to the cost of the said vessel, on or before the first day of September then next.

And the parties then by writing agreed, "that from the day of the vessel sailing on her first trip, they would become co-partners in the said steam boat, and all the property thereto belonging in the proportion following, viz: Gilpin of one-tenth part of the said stock, and Green of the remainder, and in such proportions should bear the expenses and losses, if any, attendant on the said undertaking, and should divide the profits according to their respective shares."

They agreed further, that Greene was to be the managing owner of the boat, and have the whole control of her, and that Gilpin as master should exercise the authority belonging to that office, and should keep the accounts, and render statements of each trip to Greene, for which he was to receive 150*l.* as the first year's salary, to commence from the date of the agreement, and terminate at the close of navigation, or immediately after the accounts for the season should be balanced; that the salary of 150*l.* was to be over and above the profits which should accrue to Gilpin on his share, and was to be paid from time to time as required; and if he gave satisfaction as master and chose to continue his services, his salary for future years was to be determined thereafter, but not to be less than 150*l.*

And Gilpin agreed that he would pay to Green the proportion of the cost of the vessel as it might become due on his share, on or before the first day of September then next.

The attorney who drew the agreement was called as a witness, and proved that while he was preparing it, the plaintiff asked the defendant when he expected to have the boat out, to which the latter replied, that he could not say,

as he depended on the Niagara Dock Company for the engine, but he thought she would be ready in June—this was before the agreement was signed. It was admitted by the defendant that the steamer did not in fact come out till the beginning of this season, (1849).

An engineer employed in the dock company proved, that the engine was not ready in 1848. He was directed by the president of the company to stop the work, and, as the witness understood, for want of funds, which this defendant should have furnished.

The plaintiff paid to the defendant the 311*l.* 15*s.* 0*d.* under the agreement, and sought to recover it back in this action.

The defendant objected at the trial that he could not do so, even with the aid of the evidence given by the attorney of what passed before the execution of the agreement, which he contended was not admissible to alter the effect of the written instrument.

A verdict was rendered by consent for the plaintiff, subject to the opinion of the court on the plaintiff's right to recover. The plaintiff, by his particulars delivered, claimed for cash paid to the defendant on account of the steamer *Hibernia*, 311*l.* 15*s.* 0*d.*, with interest.

Cameron, Q. C., obtained a rule upon the leave reserved. *Leggo* shewed cause. Cases cited by *Leggo*: *Plovey* on Partnership, secs. 2, 3, 5, 6, 8, 23, 32, 36, 45, 48, 49, 122 (a), 194; 13 Ea. R. 7; 2 Stark, C. 107; *Collyer* on Partnership, 1097; 3 B. & C. 814; 12 Moore 411; 10 Jurist, 460. By *Cameron*, 2 Y. & J. 278.

ROBINSON, C. J., delivered the judgment of the court.

It was not explained upon the trial, and I do not now see upon what idea this action was brought. It may have been because the plaintiff expected to make out by Mr. Sadler's evidence that the defendant had expressly engaged that the vessel should be ready to sail in June, and that as she was not then ready, and through some fault of the defendant, the plaintiff had a right on that account to treat their agreement about joint ownership as rescinded, and to reclaim his money.

I received the plaintiff's evidence respecting the alleged undertaking that the vessel should be ready by the 1st of June, telling him, however, that I still could not see on what ground his action could be supported. And as both parties seemed to think that there was a question which they were willing to leave to the court in banc, I allowed a verdict to be conditionally given for the plaintiff, stating that the questions would be—1. Could Mr. Sadler's evidence be properly admitted. 2nd. If it could, would it support the action. 3rd. If it must be discarded, how would the plaintiff stand.

I consider now, as I did at the trial, that the evidence of Mr. Sadler was not admissible, because it was evidence of a conversation prior to the execution of the written agreement, and could not be allowed to alter its terms; 2ndly. What was proved by Mr. Sadler did not, after all, amount to any engagement by the defendant that the vessel should be ready at any certain time, but was a mere expression of opinion in answer to a question asked of him; 3rd. There was no legal proof that the defendant had been the cause of the delay in getting out the vessel; all that was sworn to was hear-say, and without it's being proved even from whom the information came.

Then, confining ourselves to the written agreement and to the effect of the little other evidence that was given, all that we see is, that the money which the plaintiff is now suing for, has, with his assent and according to his agreement, been either expended, as we may suppose in building the vessel which was then in progress, or in repaying to the defendant so much of what he had expended for that purpose; and, from all that was proved at the trial, the vessel is at this moment the joint property of the plaintiff and the defendant. Then on what principle does the plaintiff claim to have his money back? He says there was an intended partnership which never took effect, and so that the plaintiff can recover back his stock paid in upon the confidence that a partnership would be formed; but, for all that appears, as the vessel is now complete, she is the joint property of the two, in the proportions provided for by

the agreement. If anything has happened to change their position, why was not evidence given of it at the trial?

No doubt there are instances enough in the books, where a party contributing to some proposed joint stock adventure which did not go into effect, has been allowed to recover back his money in an action for money had and received; but in each case we see the circumstances which, in the opinion of the court, gave him a just right to reclaim his money. Here nothing is shewn.

Per Cur.—We will allow the plaintiff the advantage of a new trial on his paying costs in a month—otherwise, judgment of non suit.

HAWKESHAW, ADMINISTRATRIX OF HAWKESHAW, v. THE DISTRICT COUNCIL OF THE DISTRICT OF DALHOUSIE.

Liability of District Council to individuals for not keeping steps of District Court House in repair—statute 10 & 11 Vic. 6.

Under the provincial statute 10 & 11 Vic. ch. 6., a District Council cannot be made liable in damages for an injury, resulting in death, occasioned to an individual in walking up the court house steps, which had been allowed to fall into an unsafe and dangerous condition. The council was charged in this declaration as having the court house under their control and as bound by law to keep it in repair; and judgment was arrested on this averment, as the act 4 & 5 Vic. ch. 10, sec. 46, throws the responsibility of keeping the court house in a proper state of repair on the district surveyor, upon whose report, in the first instance, as to the necessity of the repair and the expense, the council have to pass a bye law.

Quere—Would the council be liable to an individual for not passing such a bye law after the report of the surveyor had been submitted.

Action on the case founded on the statute 10 & 11 Vic. ch. 6, to recover damages on account of the death of Oliver Hawkeshaw, charged to have been occasioned by the neglect and default of the defendants, in not repairing a public building under their control.

The plaintiff sued as administratrix of Oliver Hawkeshaw. The declaration contained two counts. In the first the plaintiff declared, that on the 4th July, 1848, and from thence till after the time of the grievance complained of, the said Oliver Hawkeshaw was a constable for the township of Nepean, in the district of Dalhousie; and that on the said 4th July, and while he was such constable, the court of general Quarter Session of the peace and the District Court for the district of Dalhousie, were being

holden at the court house of the said district at Bytown, at which courts the said Oliver Hawkesshaw was in attendance, discharging his duty as constable ; that while he was so attending, &c., viz :—on &c., the steps of the said court house leading into the same, and by which access to the said court house was usually and customarily had, by all persons lawfully and necessarily frequenting the same, were, and for a long time had been, in an unsafe, insecure, dilapidated and ruinous condition, and unsafe and unfit to be used for the purposes aforesaid ; that the said Oliver Hawkesshaw, as such constable, *and in the discharge of his duty as aforesaid*, “ *then having occasion to use the said steps,*” and being then on and near the same, the said steps by reason of and in consequence of such, their unsafe, insecure, ruinous and dilapidated condition as aforesaid, suddenly gave way and fell, and divers large quantities of the stones and other materials of which the same were composed then fell upon and across the limbs of the said Oliver Hawkesshaw, by means whereof the legs of the said Oliver Hawkesshaw were then broken and fractured, and the said Oliver Hawkesshaw then received and suffered divers other wounds and bruises in other parts of his body, whereby the said Oliver Hawkesshaw then suffered great pain, and remained and continued in such pain &c., from thence until the fourth day of August in the year aforesaid, when he languished and died ; by means whereof, not only the said Oliver Hawkesshaw was put to great expense, to wit, to 50*l.*, in endeavoring to cure the said wounds, and was hindered from attending to his necessary affairs,—but the plaintiff since his death has incurred and been put to great expense, as administratrix as aforesaid, to wit, 10*l.*, in and about the burial of the said Oliver Hawkesshaw.

And the plaintiff further averred, that at the same time the said Oliver Hawkesshaw was so injured as aforesaid, by the fall of the said steps, to wit, on the day and year aforesaid, and a long time before, *the said court house was the public property of the said district of Dalhousie, and under the control, care and management of the district council for the district of Dalhousie aforesaid ;* and the plaintiff further

averred that long before the said accident so happening to the said Oliver Hawkeshaw, and while the said steps were in such unsafe, dangerous and dilapidated condition as aforesaid, viz: on &c., *the defendants had full knowledge, and were notified thereof, and requested to repair and amend the same*, but notwithstanding such request, and notwithstanding such their knowledge as aforesaid, the defendants then wholly refused to amend or repair the same, and from thence until, and at, and after the said *accident, wholly neglected and refused to repair or amend the same, although it was the duty of the defendants, during all the time aforesaid, to keep the said court house steps in good and decent repair* and in a firm and secure condition; and although the defendants *had, during all the time aforesaid, sufficient means and funds of the said district* at their disposal, and *applicable for the purpose of such repair* and amendment as aforesaid; and the plaintiff averred that the said accident and injury and subsequent death of the said Oliver Hawkeshaw, as aforesaid, happened *by and through the mere and gross negligence of the said defendants, and inattention to their duty in that behalf.*

The second count stated, that before and at the time of the grievances thereafter mentioned, to wit, on the 4th July, 1848, the steps of and leading to the court house of the said District of Dalhousie, were in an unfirm, unsafe and dilapidated condition, and greatly in want of repair, of all which the defendants then had due notice; that the said Oliver Hawkeshaw being then a constable duly appointed &c., was then, to wit, on &c., in the discharge of his duty as such constable, at the court house aforesaid, and then and there had occasion to use, and did use the said steps of and leading into the said court house; and that while the said Oliver Hawkeshaw was so using the said steps, the same, in consequence of their bad condition and want of repair, as aforesaid, gave way and fell down, and divers quantities of stone, mortar, and other materials of which the same were composed, fell upon &c., (describing the injury and damage to the said O. H. as before, and his death).

And the plaintiff then averred, that long before and at the time of the said fall of the said steps, the said court house *was the public property of the said district, and under the control of the defendants, and that they were bound by law to repair and amend the same*; and that the fall and the injury to the said Oliver Hawkeshaw occasioned thereby happened as aforesaid by and through the mere negligence, carelessness, neglect and default of the defendants; by means of which premises, the plaintiff as such administratrix as aforesaid, hath sustained damages to 5000*l.*, and therefore, &c., concluding with profert of the letters of administration to the plaintiff.

The defendants pleaded—

1st. Not guilty to the declaration.

2nd, to 1st count—that Oliver Hawkeshaw was not a constable duly appointed for the township of Nepean.

3rd, to 1st count—that he he was not then there in discharge of his duty as constable, as alleged.

4th, to 1st count—that the steps were not, and never had been in an unsafe and ruinous condition, as alleged.

5th, to 1st count—that at the said time when &c., *the said court house was not under the control, care and management of the defendants*, in manner and form &c.

6th, to 1st count—that the defendants had not full knowledge of the unsafe and dangerous condition of the said steps &c.

7th, to 1st count—that they were not requested to repair the steps in manner and form, &c.

8th, to 2nd count—that the steps at the said time when &c., were not in an unfirm and unsafe condition, and greatly in need of repair &c., in manner and form &c.

9th, to 2nd count—that the defendants had not before or at the time, when &c., notice of the steps being unsafe, &c.

10th, to 2nd count—that O. H. was not at the time when &c., a constable duly admitted and sworn, &c.

11th, to 2nd count—that the court house at the said time when &c., *was not under the control of the defendants*.

Verdict for the plaintiff 50*l.*, to be apportioned as fol-

lows :—10*l.* to the plaintiff, and the balance to be equally divided among the children under twelve years of age; viz : Ellen, Elizabeth, George, John, and Susan Hawkeshaw.

H. Eccles obtained a rule to arrest the judgment on the ground, that the causes of action set forth were not sufficient in law to support an action or judgment against the defendants. *G. Sherwood* shewed cause.

The authorities referred to were 6 Clk. & F. 894 ; 3 M. & W. 1 ; 11 Jurist, 758 ; 2 Car. & Kir. 661 ; 4 Taunt. 649 ; 2 H. Bl. 350 ; 2 T. R. 672 ; 5 Bing. 108 ; 2 Saund. 158 ; 4 & 5 Vic. ch. 10, secs. 37, 39, 46, 47, 43.

ROBINSON, C. J., delivered the judgment of the court.

The provisions of this statute, which is similar to one lately passed in England, are, that whenever the death of a person shall be caused by “ wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then the person who would have been liable (if death had not ensued) shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.”

The first question then is, if Hawkeshaw had been injured only, and had not died, could he have brought an action against the district court for the injury he sustained in consequence of the steps of the district court house being insecure, and falling when he stepped on them ? That raises several questions. Is a private individual bound to keep in repair the premises which he occupies ? I have not succeeded in finding any action founded on such a principle. He is bound to create no nuisance on his premises, by which persons coming to them on a lawful occasion may suffer injury ; for instance, if he should leave a well which he was digging without guard or protection, or a deep ditch, or a cellar for an intended building, or if in the course of building or making repairs he should negligently leave building materials in a situation which exposed others to injury, I assume that he might be liable for dam-

ages thus occasioned; but, if the defendants were the private occupants of the building in question for their own use, and had allowed the step leading to the front door to be rotten or out of repair, and a person who came to them on business or by invitation had fallen and been injured, could such person have maintained an action? I do not say that he might not, but should hesitate before determining that he could. It would be necessary to reflect on the consequences to which that might lead. The difference is between mis-feasance and non-feasance—between the making or placing something in such a manner as may occasion injury, and the not sustaining premises in a sound state of repair. If from the latter cause a nuisance is occasioned to a highway adjoining, no doubt an action would lie.

But admitting that if the defendants had been occupying the building as owners or tenants, they would have been liable to Mr. Hawkeshaw in damages if he had been merely hurt by the stone step falling as it did, and from the cause alleged, still the difference between such a case and the present is, that the defendants are not in this action charged as occupants, on the principle affirmed in *Payne v. Rogers*, 2 H. Bl. 350. This declaration in both counts grounds the action wholly on the defendants' neglect of a public duty. The court house is truly stated to be a public building, and the averment is, that it was under the care and control of the council, and that they were bound by law to amend and repair it.

But we must take judicial notice that by the 37th clause of the statute 4 & 5 Vic. ch. 10, it is made the duty of the district surveyor, "*to take care of all fixed property belonging to the district,*" and to report to the Warden as often *as need may be*, upon the state of such property, with an estimate of the expense required for anything recommended to be done.

All that the district council is to do or can do in the matter, is to pass bye laws for authorizing the work and raising and appropriating the necessary funds; and the 46th clause requires that before doing this they must receive

from the district surveyor an estimated expense of such work.

The legislature having provided for the appointment of a district surveyor, and made it his duty to take care of all the fixed property of the district, and to report upon its state to the council, with an estimate of anything necessary to be done, they have thereby, in my opinion, relieved the council from the onus of judging at their peril of the state of all the public buildings of the district, and have left to them only the duty of passing such laws in this respect as may be necessary for carrying out the recommendations of the responsible officer. The complaint is in fact that they did not pass a proper bye law ; but admitting, which I am not prepared to do, that an action will lie against a municipal council for omitting to exercise their legislative functions, it should at least be shewn that the proper officer had reported upon the necessity of the repair in question, and submitted an estimate of its expense. Without that, I do not see any obligation on the council to move in the matter ; nor can I say that, till that is done, they would or could have in their hands any funds legally applicable to such a purpose.

It is true that by the 43rd clause of the district council act the court house is vested in the district council—that can only make them as it were the owners of the building ; but it is not from the ownership of the property that the common law duty arises, when it does arise, but from the occupation.

We cannot, I think, hold the district council to be the actual exclusive occupants of the court house. It is a building used for public purposes, with some of which they have no connection, and placed by an express bye law in the care of the district surveyor.

In the case of the corporation of Lyme Regis v. Henley, 1 Bing. N. C. 235, in error, the principles of such an action as the present were much discussed. It was held there to lie against the corporation, because the duty to repair arose from an express condition in their charter ; a ground which cannot apply here ; but it is there stated to be a test of the

individual's right to maintain such an action that he had sustained some positive damage, and that the obligation to repair was matter of so general and public concern that an indictment would lie for not repairing.

According to that test, it would be impossible to support this action ; for it cannot be maintained that the district council could be indicted for not passing a bye law for repairing a public building, which building is by law placed under the care of a distinct public officer, who had not reported to them the necessity of such repair, or at least is not shewn to have done so. In the same case of Henley and the corporation of Lyme Regis, when it was before the Common Pleas, Best, C. J., (5 Bing. 108), seemed to rest the right of action in such a case when it is brought against a public officer upon the fact of his receiving a compensation for discharging the duty, which if it be a true and universal test, would introduce a new question here.

And the case in 6 Clk. & Finelly, 894, would seem to interpose a new difficulty, on the ground that the district council having no funds except such as have been raised for specific purposes, and having no authority to raise money to pay a verdict against them, cannot be held liable to a pecuniary claim of this nature.

We are of opinion however, that the rule for arresting judgment should be made absolute on the specific ground that the defendants are only charged in this action as having the court house under their control, and by law bound to keep it in repair ; whereas we are compelled to take notice that the district council have not the court house under their control, in the sense here intended, but it is placed here by law under the care of the district surveyor, upon whom the responsibility is in the first place thrown of reporting and estimating for necessary repairs, when, and not before, it becomes the duty of the council to pass a bye law for the purpose. But that they would be liable to an action by an individual for not passing such a bye law, is not at present my opinion.

If this action could be supported, then I do not see why an action should not equally lie against the district council

in a multitude of other cases, in which I am confident it was never imagined they could be made liable. For instance, under the recent statute 12 Vic. ch. 81, sec. 31, they have power to pass bye laws "making regulations as to pits, precipices, and deep waters, or other places dangerous to travellers;" and it might as well be contended that every person who meets with an accident, because a highway in any part of the district is in an unsafe state, has a right of action against this legislative body, because they did not, at their peril, notice it, although there is an officer whose special duty it is to report to them when any work of the kind is required; and although they are unable to take any steps without his report, and can do nothing at any rate but pass a bye law, and are limited as to the amount of the money they can raise, and have no means of paying any damages that may be recovered against them.

Per Cur.—Rule absolute to arrest the judgment.

DOE DEM. BURNHAM V. SIMMONDS.

Necessity for inserting under the new rules in the record of actions of ejectment the placita, continuances, jurata, &c.—Amendment of an erroneous rule of court, and its effect upon the proceedings under such rule.

The new rules of Hilary Term, 13 Vic., do not dispense with the *placita, continuances, jurata, &c.*, in the record of an action of ejectment.

Proceedings cannot be sustained which are in direct opposition to the terms of a rule of the court, though the terms of such rule be not in accordance with the order of the court, through a mistake of the clerk; and such proceedings cannot be supported by a subsequent amendment, for the effect of such amendment is not retrospective.

The plaintiff was nonsuited for not confessing lease, entry and ouster. A rule nisi was obtained in Michaelmas term to set aside the notice of trial served, and nonsuit, for irregularity, with costs, on the ground that the notice was served, the record entered and nonsuit obtained, pending a stay of proceeding by order of this court; also, because the nisi prius record was improperly entitled as of Trinity term, 9 Vic., the consent rule being entitled of Hilary term following. And because the record contained no *placita*, warrants of attorney, *continuances*, or *jurata*. The nisi prius record was made up as of Trinity term, 9th Vic., 1846, the consent rule was dated as of Hilary term, 9th Vic., 17th October, 1846.

After the similiter, there was the entry: "Therefore, for the trial of the said issue, the sheriff &c., is commanded that he cause to come &c., before &c., on Tuesday the 15th October, 1850, twelve &c.," following the form authorized by our 40th rule of Hilary term, 13 Vic., which must have been done without adverting to the 45th rule, which provides that the proceedings in ejectment shall continue as heretofore.

In Easter Term, 1850, a rule was obtained for setting aside a verdict which had been rendered at the previous trial of this cause, with costs; and, by mistake, the clerk in making out the rule, added the words "and in the mean time all proceedings be stayed." This rule issued on the 13th of June, 1850, and was served on the agent of the plaintiff's attorney on the 14th of June.

On the 16th of September the costs were taxed and *allocatur* taken out. On the 7th of October, 1850, notice of trial was served for the assizes at Cobourg, to commence on the 12th. On the 10th of October the defendant's attorney served notice on the plaintiff's attorney, that he would move to set aside the notice of trial and all subsequent proceedings with costs, on the ground that the costs taxed on the former rule of Easter term were yet unpaid, and that the rule enjoined a stay of proceedings till the costs should be paid.

In Michaelmas Term (on the 29th November), the plaintiff's attorney obtained an order of this court, to amend the rule of Easter term, by striking out the words directing a stay of proceedings.

ROBINSON, C. J., delivered the judgment of the court.

The rule granted in Easter term, 1850, was granted on the ground that the nisi prius record was not regularly made up, and referring to it, the court found it to be in that condition that they at once set aside the plaintiff's verdict, with costs; that is, the order was that the plaintiff should pay the costs of the application.

It was right that the rule should be amended, as it was, with a view to its future operation; but that amendment could not have a retrospective effect in making it regular

for the plaintiff to proceed in opposition to the very terms of the rule. Still, it could not fail to be known that the rule had been taken out erroneously by a mistake of the clerk, for which the attorney taking it out is justly responsible, for it is his business to see that the rule corresponds with the actual order of the court. That consideration might weigh with the court not to give costs to the party afterwards taking advantage of the irregularity, though they might find it wrong to sustain any proceeding taken in direct disregard of the terms of the rule.

There is no question however in this case, that the rule now moved must be made absolute on the other ground—namely, that the *nisi prius* record was improperly made up. There was no authority for dispensing with the *placita* and *jurata*, in actions of ejectment. In that respect, all stands in such actions as it did before the late rules.

Per Cur.—We therefore make the rule absolute but not with costs.

DOE DEM. DIBBLE V. TEN EYCK.

DOE DEM. DIBBLE V. MENZIES.

Necessity of a married woman, when entitled to the fee of land, being examined as the law requires—The effect of her non-examination as to passing the interest of wife or husband in land during coverture or afterwards.

Under either of the provincial statutes, 43 Geo. III. ch. 5, 59 Geo. III. ch. 3, or 1 Wm. IV, ch. 2, a deed professing to convey a married woman's estate, executed by her jointly with her husband, but containing no certificate on it of the wife having been examined as the law requires—is ineffectual to bar either *the wife or her husband* during coverture or afterwards.

Ejectment. The plaintiff's title was this:—In 1813 the crown granted the land to one Thaddeus Davis. In April 1830, the grantee made his will, devising this land to his daughter Phœbe, and his other children. Phœbe Davis married Alanson Dibble, and on the 5th November, 1833, her husband and she joined in a common deed of bargain and sale, conveying the land in question to Irel H. Dibble, the lessor of the plaintiff in both actions. This conveyance embraced the land claimed in both suits; it was a deed of bargain and sale in the common form of printed deeds. Phœbe Dibble was described in it as one of the devisees of Thaddeus Davis; and the deed declared “that Alanson

Dibble and Phœbe his wife, in consideration of 222*l.* 10*s.* bargained and sold to Irel H. Dibble the lands described in it, and all the estate, right and interest of them, the said Alanson Dibble and Phœbe his wife in the same, to hold to him, &c." The deed contained covenants by Alanson Dibble and *his wife*, that they had good right to convey, and for quiet enjoyment, and for further assurances.

The deed was registered in the same month, but there was no certificate upon it of the wife having been examined as the law required.

No evidence was given of the title in the defendant in either case. The Chief Justice considered at the trial that he could not, consistently with the opinions which he recollected to have been expressed in former cases of this kind, allow the plaintiff to recover, though it was contended that at all events, the deed must be taken to have passed the interest of the husband.

A nonsuit was granted in each case.

Martin obtained a rule to set the nonsuit aside, without costs, or with costs to abide the event.

Freeman shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that under either of the provincial statutes, 43 Geo. III. ch. 5, 59 Geo. III. ch. 3, or 1 Wm. IV. ch. 2, this deed, professing to convey a married woman's estate, executed by her jointly with her husband, is ineffectual to bar either her or her husband during coverture or afterwards.

There is nothing in these statutes to indicate that the legislature intended to give any greater effect to the deed under one statute than under the other, when there should be no examination by the proper authority. The evident object of the several acts is, to afford greater facilities for the examination, not to give any different effect to the deed when there should be no examination.

In the first of those statutes it is expressly declared that nothing in "such deed contained"—that is, the joint deed of the husband and wife, which the act authorizes to be

made for alienating the wife's property, "shall have any force or effect to bar the married woman, or her husband, or her heirs, during the continuance of the coverture or after the dissolution thereof, or shall be held to have any force or effect whatever, unless such married woman shall appear in open court," &c.

The 59th George III. chapter 3, though it introduces a modification in respect to the person who may examine, &c., preserves the very words I have just cited, and applies them to any deed executed by the husband and wife, when there shall be no examination, as that act authorizes.

The 1st William IV. chapter 2, makes a further change as to the persons who may grant the certificate, and provides, nevertheless, that any such deed, executed by the husband and wife, of the wife's land, shall not be valid or have any effect unless such married woman shall go before, &c.

It does not, it is true, repeat that it shall not bar the wife or the husband during or after the coverture ; but merely that "it shall not be valid or have any effect," which, it must be admitted, is an expression pretty nearly if not quite equivalent in its effect to the language of the others, since a deed would have some effect if it should bar the husband during coverture.

The legislature did not in the latter statute retain all the expressions used in the former statutes, but they retained that expression which was the most comprehensive and the strongest—an expression that seems necessarily to include the others ; for a deed could not be allowed, it may be argued, to have the effect of barring either the husband or wife for any time.

I must confess though, my opinion has wavered on this point ; but I think we should hold that so far as the effect of the deed is concerned, the legislature meant the same thing in all these acts ; and the same principle applies here as was applied by the court of King's Bench in *Murray v. The East India Company* (a), with respect to the statutes of limitations, where Lord Tenterden observed, "The

(a) 5 B. & Al. 215.

several statutes of limitations being all *in pari materia*, ought to receive a uniform construction, notwithstanding any slight variation of phrase, the object and intention being the same."

I am not aware that we have in any case given a judgment which would support the recovery by these plaintiffs. If I could find that we had, I should desire to retain this case longer under consideration ; for it is important that the law should be consistently administered in regard to titles to real property. Here the plaintiff is setting up a title in himself, under a deed of a married woman who has never been examined.

In Doe dem. Connor v. Collyer (*b*), it was intimated by me that the husband's estate might pass under a deed, notwithstanding the defect which exists in this case ; but it was not necessary to determine that point, for in that case a certificate had been obtained, but it did not express that the deed itself had been executed in presence of the justices, which we thought need not be stated in the certificate, but was a fact that might be otherwise proved, and on that ground upheld the deed.

In Doe Wilson and Wife v. Wessells, we considered, I think, that the husband could not himself bring ejectment to regain possession of the land in the face of his own covenant for quiet enjoyment, though there had been no certificate. This case is very different, for it is not the husband who is here suing in the face of his own covenant.

Per Cur.—We think the rules to set aside the nonsuit in these cases must be discharged.

A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN THE

COURT OF QUEEN'S BENCH,

FROM TRINITY TERM, 13 VICTORIA, TO
EASTER TERM, 14 VICTORIA.

ABSCONDING DEBTOR.

See "Bills of Exchange," &c., 24.

ACTION.

See "School Trustees" 2, and "District Council" 1.

1. *Grantee of Crown. His lessee. The proper plaintiff to bring action for disturbance of Ferry.*] The Crown grants a right of ferry to A., who leases by writing, not under seal, to B.; C. disturbs the right of ferry, and B. brings an action on the case against C. for such disturbance; but *Held per Cur.*, that the plaintiff B. must be nonsuited, the right to sue being in A., the grantee of the franchise, and not in B., who, if he is interfered with, must look to A. and not to C.—*Higgins v. Hogan*, 401.

ACCOUNT.

1. *Tenant in common or joint tenants, action between.*] At common law there can be no action of account by one tenant in common or joint tenants, unless there has been an appointment of one by the other as plaintiff.—*Gregory et ux. v. Connolly*, 500.

ADVERSE POSSESSION.

2. *Tenant. Title. Adverse Possession.*] Where A., in possession, asserts a claim under and not by title, independent of B., who makes a conveyance to C., B.'s deed cannot be said to be bad, as made while A. was in adverse possession.—*Doe dem. McKenzie and of Wallace S. Fairman v. Warren Fairman*, 411.

AGREEMENT.

See "Marine Policy" 1.

1. *Averment. Past Consideration. Agreement void.*] An agreement declared upon in the following manner held to be bad, as disclosing an agreement void in law for want of legal consideration to support it: "That it was amongst other things agreed, that in consideration that the plaintiff had leased from the defendant certain lands at 5s. per acre, the defendant undertook and promised that he would, within a certain time, build a house and barn on the premises so demised; and that for every acre of land cleared and fenced in fields not exceeding 7½ acres, by the plaintiff, he, the de-

pendant, should pay to the plaintiff 3*l.* for every acre of land so cleared and fenced as aforesaid.”—Cunningham v. Richardson, 163.

2. *Construction of.*] In trespass for mesne profits, before the verdict was taken the plaintiff’s attorney and defendant signed a paper by which it was agreed “that *in case* a verdict shall be given for the plaintiff, the costs in the suit shall be left to be taxed by, &c., and the value of the mesne profits shall be decided by,” &c. The court held that the words “in case a verdict shall be given for the plaintiff,” did not preclude defendant from contending against a verdict at the trial upon any ground he might have in law or upon the merits.—Patterson v. Prince, 528.

ALBION PLANK ROAD.

See “Tolls,” 1.

APPEAL.

On point of practice.] This court will not sustain an appeal from the court below upon the question, whether the plaintiff or defendant was entitled first to address the jury.—Hastings v. Earnest, 520.

ARREST.

1. *Judge of County Court. Barrister. Privilege from.*] The Judge of a County Court cannot be arrested upon mesne or final process. A barrister cannot be arrested on mesne process.—Adams v. Ackland, 211.

2. *Judge of Surrogate Court. Privilege from.*] The Judge of a Surrogate Court for one of the counties of this province is exempt, on grounds of public policy, from imprisonment for debt.—Michie v. Henry Allen, Esq., 482.

ASSIGNEE OF BANKRUPT.

See “Estoppel.”

ASSIGNMENT OF GOODS.

How far valid, when intended to defeat an expected execution.] *Semble*, that since the decision of Wood v. Dixie (7 Q. B. R. 829), a bona fide transfer of property made by a debtor to a third party, cannot be considered invalid merely because the object of the sale, in the mind of both parties, was to defeat an expected execution. The will in this case, however, was discharged on other grounds; and see the strong language of Robinson, C. J., expressing a hope that whenever it became necessary to decide here the point taken in Wood v. Dixie, the court might not feel itself constrained to adopt such a view of the law.—White v. Stephens, 340.

ATTACHMENT.

See “Sheriff.”

ATTORNEY & SOLICITOR.

1. *Client. Liberality in practice.*] A client is not to be regarded as having a right to govern the conduct of his attorney, as to the degree of liberality he shall observe in his practice.—Shaw et al. v. Nickerson, and Gillespie et al. v. Nickerson, 541.

2. *Liability of. Duty as to taking unfair advantages.*] *Semble*, that an attorney would not be liable for culpable negligence, in not urging for his client the defence, that the agreement upon which he was sued was made on a Sunday, as it is no part of his professional duty to take all dishonest advantages.—Vail v. Dugan et al.

AWARD.

1. *Setting aside of.*] The court will not intend matter for the purpose of setting aside an award;

such matter must be shewn affirmatively.—*Tracey v. Hodgess*, 5.

2. *When may be made.*] An award may be made before the time to which the arbitrators had made an enlargement.—*Ib.*

3. *Objection to rule nisi for setting aside, how answered.*] The objection to the rule nisi for setting aside the award, that it is not drawn up "on reading the award," is well answered by shewing that among "the affidavits and papers filed," on reading which the rule was drawn up, there was a copy of the award verified by affidavit.—*Ib.*

4. *Non-performance of. Covenant lies.*] When an award directs two parties to pay each a certain sum of money to a builder, and one is obliged to pay the whole, from a refusal by the other to pay his share, the party so paying can compel contribution by suing the other in covenant for non-performance of the award.—*Allen v. Coy*, 419.

BAIL.

See "Clerk Crown and Pleas."

1. *Bail-piece.*] The bail-piece need not set out the writ on which the defendant has been arrested. It is not therefore necessary that the certificate of the Clerk of the Crown and Pleas, of the defendant having filed a recognizance of bail (under 10 & 11 Vic. c. 15, s. 5), should state the writ on which the defendant has been arrested.—*White v. Petch & Manning*, 1.

2. *Debt. On a recognizance of. Outer district.*] In debt, on a recognizance of bail, the declaration will be bad if it appears that the plaintiff is bringing his action in an outer district, upon a record of this court remaining in Toronto.—*Manning v. Proctor et al.* 22.

BANK OF U. CANADA.

1. *Power of, to hold vessels in security for any purpose.*] The Bank of Upper Canada, by their amended charter, 6 Vic. ch. 27, sec. 19, are disabled from holding ships or vessels for any purpose whatever, whether as security for pre-existing debts or for present advances.—*McDonnell et al.*, assignees of Donald Bethune, a bankrupt, v. The Bank of Upper Canada, 252.

2. *Power of, to take mortgages upon real estate.*] *Semble*, that the Bank of Upper Canada may take mortgages upon real estate, in order to secure debts previously contracted.—*McDonnell et al.*, assignees of Donald Bethune, a bankrupt, v. Bank of Upper Canada, 252

BARRISTER.

See "Arrest."

BANKRUPT.

Cognovit given by bankrupt in contemplation, &c., void.] A cognovit, given, in the opinion of a jury, by a bankrupt in contemplation of bankruptcy, and for the purpose of giving to the defendant a preference or priority over his general creditors, is a security within the 19th clause of the bankrupt law, and therefore void.—*Brent*, assignee of *Draper*, v. *Perry*, 24.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See "Pleading," 13, 21; "Evidence," 15, 16; "Variance," 6.

1. *Debt. Note. Satisfaction of, by one of two joint debtors.*] The note of one of two joint debtors is no satisfaction of the debt.—*Leonard v. Acheson et al.*, 32.

2. *Presentment to maker.* [Statute 12 Vic. ch. 22.] The

statute 12 Vic. ch. 22, respecting the *presentment* to the *makers* of notes on inland bills of exchange, &c., &c., does not apply to Upper Canada.—*Ridout et al. v. Manning et al.*, 35.

3. *Bill. Parties. Evidence. Averment. Agent.*] No action lies upon a bill except against those who are in some shape parties to the bill itself. Where, therefore, A. drew a bill of exchange on B. in Montreal, in his own favour, and endorsed it to C., who, in her own name, endorsed it to the plaintiff; and it appeared upon the evidence that C. was a lady residing in Toronto, who had a brother D. residing in Buffalo, for whom, though not a partner, or in any way transacting business in her name, she had negotiated bills in Toronto at banks and with merchants, it was *Held per Cur.*, that in an *action on the bill* brought by the plaintiffs, the endorsees against D., upon an averment, "that A. endorsed the said bill to one C. the agent of *this defendant* or her order, and delivered it so endorsed to her as *such agent*, and that the said C., then being the agent of the defendant in that behalf authorized for and on behalf of the defendant, then endorsed and delivered the same to the plaintiff," that the action could not be sustained, the name of the principal D. not appearing upon the bill in any shape.—*Ross et al. v. Robert Codd*, 64.

4. *Endorsement by Wife.*] *Semble*, however, that a defendant's endorsement made by his wife, though in her own name, and proved, as in this case, to have been afterwards recognized by the defendant, would make him liable to an action on the bill.—*Ib.*

5. *Liability of party whose*

name does not appear on a bill to the holder, on the common counts.] The party discounting a bill has, in general, no recourse whatever upon the person from whom he has taken the bill, when the latter has not in any way made himself a party to the bill; peculiar circumstances, however, may render a party whose name does not appear on the bill liable to the holder, on the common counts; and it was *Held per Cur.*, that the evidence in this case warranted a recovery against such party, upon the common counts for money had and received.—*Ib.*

6. *Note. To maker's own order. How to be declared on.*] An order may be declared upon as a note payable to the *bearer*; but to declare upon such a note that he, (the maker), made an *instrument in writing* promising to pay to *his own order*, would be bad.—*Wallace v. Henderson*, 88.

7. *Effect of maker's signature made after endorsement to holder*] It is no objection to the validity of a note, that at the time it was endorsed to the plaintiffs it had not in fact been signed by the maker; the subsequent filling up of the maker's name, or of the amount, or of a payee's name, will be treated as if made before the endorsement.—*Rossin et al. v. McCarty et al.*, 100.

8. *Demurrer. Initial letters.*] Where a payee was described, in declaring upon a note, by the capital letter of his second christian name, "James A. Walker," as he described himself in the note, instead of giving his second name in full, the court held the declaration good, adhering to the decision in this court of *Dougall v. Reafish*, 6 U. C. R. 391.—*Muir v. Jones*, 139.

9. *Special demurrer. Initial letters. Second name.*] Wherever in pleading, one christian name shall be given to a party in full, with a capital letter before or after it, besides the surname, the court will not assume that the party so described has anything more of a name than is given to him, and that without distinction between vowels and consonants.—*The Bank of Upper Canada v. Gwynne*, 140.

10. *Declaration. Averment of names of firm. Endorsement by firm.*] In declaring upon a note made payable to and endorsed by a firm, it is necessary to aver that the maker of the note promised to pay "to certain persons, using the name and style of," &c., and then to aver that the said persons so using the name and style, &c., did by such name and style, &c., endorse the said note.—*Moffatt v. Vance*, 142.

11. *Assumpsit. Endorsee v. Endorser. Averment of promise to pay.*] In an action of assumpsit, brought by an endorsee against an endorser of a note, the declaration, after averring the endorsee's liability to pay, need not aver that he *promised* to pay.—*Bank of B. N. America v. Jones et al.*, executors, &c., 166.

12. *Executors of Endorser. Death of defendant's testator. Averment of executor's promise to pay.*] If, however, the party sued be the executor of the endorser, instead of the endorser himself, and the note has become due after the death of their testator, a promise to pay by the executors must be stated in the declaration.—*Ib.*

13. *Note payable to bearer. Endorser. Before delivered to bearer. His liability to holder.*

Averments.] A. made his note payable to B. or bearer. Before the note was delivered to B., D. endorsed it. B. sued both A. and D., averring that A. made the note, &c., that the note was then delivered, &c., to D., who became the lawful bearer thereof, who then, as such lawful bearer thereof, endorsed and delivered the same to B. *Held per Cur.*, that under this form of note, and the averments as made, D. the endorser, was liable to B. as the holder of the note.—*Vanleuven v. Vandusen et al.*, 176.

14. *Verbal agreement. Inconsistency with bill.*] Where a man draws a bill of exchange to pay a debt, he cannot set up as a defence to an action brought by the endorsee, that the bill was given upon a prior verbal understanding between himself and the endorsee that the drawees would not pay unless they choose, and that in that event he was not to be liable as drawer.—*Adams v. Thomas*, 249.

15. *Note in custody of endorsee. Endorsement thereon cancelled. What is the inference.*] Where an endorsee suing for a note produces it at the trial from his own custody, with an endorsement thereon which has been cancelled, not as if by any accident, but in the most unequivocal manner, some explanation must be given the jury for rejecting the inference that the note has been satisfied by the endorser whose name is thus cancelled.—*Peel v. Kingsmill*, 364.

16. *An endorser in blank declared against as maker by payee.*] A note made by A., payable to B. or order, and endorsed by C. in blank, cannot be declared upon by B. as a note made by C. to him the plaintiff B.—*Wilcox et al. v. Tinning and Hornby*, 372.

17. *Liability of endorser after drawee has refused acceptance.*] The endorser, like the drawer of a bill of exchange, is liable to the holder the moment the drawee has refused acceptance.—Ross et al. v. Dixie, 414.

18. *Debt of third party. Consideration for note.*] *Semble*, that a debt due by a third party, but not yet payable, may form a valid consideration for a promissory note.—Dickinson v. Clemow et al., 421.

19. *Foreign bill. Laches in presentment and in giving notice of non-payment.*] A bill of exchange drawn in Toronto on the 6th August, 1849, by a party dealing in bills, upon a party in New York payable at sight in favor of a party living in the state of Illinois, to be sent there as a remittance, and for circulation, was presented in New York on the 10th November following. *Held per Cur.*, that the delay in presenting the bill to the drawee in New York could not, under the circumstances, be held to be laches on the part of the holder. *Held also*, that a notice to the drawer from the holder living in Illinois, through his agent living in this province, of the bill being unpaid, by the latter calling upon him with the bill, on the 24th December, the bill having been presented in New York on the 19th November, could not be considered, under the facts of the case, as laches on the part of the holder in giving due notice of non-payment.—Boyes v. Joseph, 505.

20. *Want of consideration as between endorsee and endorser, pleaded by maker. Demurrer.*] It is no defence to an action on a note by the endorsee (a holder) against the maker, that the plaintiff gave no value to the endorser

for his endorsement, or that he took the note knowing at the time he took it that it was endorsed for the accommodation of the maker.—Miller v. Ferrier, 540.

21. *An attachment issuing against the payee of a note—an absconding debtor—its effect on his right to sue maker on his return.*] The payee of two promissory notes for 25*l.* each, having absconded, is not thereby disabled from suing the maker upon them on his return to the province; because, in his absence, an attachment had been taken out against him by A. B., a creditor, for 21*l.*—Slattery v. Turney et al., 578.

BINBROOK, TOWNSHIP OF.

See "Ejectment."

BOND.

1. *Construction of, by intendment.*] Where bonds or other instruments have omitted to say expressly to whom the money received by them is to be paid, the court, if this is plain from the context, will supply the words in the particular place they ought to have been by intendment.—Allen v. Coy, 419.

BUILDING SOCIETY.

1. *Ejectment. Joint Tenants. Building Society Act, 9 Vic. sec. 12.*] Under the 12th sec. of the 9 Vic. ch. 90, the president and treasurer of the building societies may sell in their proper names without further description.—Doe Barwick et al. v. Clement, 549.

CHATTELS.

See "Trespass," 4.

CIRCUIT JUDGE.

See "Lower Canada," 1.

CLERK OF CROWN AND PLEAS.

1. *Certificate. Notice of bail.*] *Quære*—Should the Clerk of the Crown and Pleas grant a certificate until he is satisfied that due notice of bail has been given to the plaintiff in the cause?—*White v. Petch and Manning*, 1.

CLERK OF DIVISION COURT.

1. *Sureties. Liabilities on bond for monies not paid over.*] The sureties of the clerk of a division court, having entered into the bonds authorized by the acts 4 & 5 Vic. ch. 3, & 8 Vic. ch. 37, are liable upon such bond to the crown for monies collected by the clerk for suitors in the court, and not paid over.—*Queen v. Patton*, *Queen v. McCullough*, *Queen v. Moran*, 83.

2. *Crown, what entitled to by way of damages.*] *Semble*, that on trial of any such action, the crown would be entitled to a verdict for the penalty of the bond, and not only for the sum received for the suitor and not paid over.—*Queen v. Patton*, *Queen v. McCullough*, *Queen v. Moran*, 83.

COGNOVIT.

See "Bankrupt," 1.

COMMISSION TO EXAMINE WITNESSES.

1. *Affidavit of due taking of. Sufficiency of its entitling when annexed to commission with the seal of commissioners.*] The affidavit of due taking of a commission to examine witnesses, though not entitled in the court or in the cause, is nevertheless, when annexed to the commission under the seal of the commissioners and referring to it, a sufficient affidavit

of the due taking of the commission.—*Doe* on several demises of *Park*, of *Hunt*, and of *Henry Desrivieres* and his wife; and of *Austin Cuvillier* and his wife, *v. Reuben Henderson*, 182.

2. *Judgment as in case of nonsuit. Costs of commission.*] Notice of trial was given by the plaintiff, and duly countermanded. The defendant obtained judgment as in case of a nonsuit, in consequence of the plaintiff not having proceeded to trial according to the practice of the court, and claimed allowance in his bill of costs for a commission to examine witnesses in the United States: he also claimed a counsel fee, and fee for preparing brief. These were refused by the Master; and upon a motion for revision of taxation, it was *Held per Cur.*, that under the circumstances of the case, the Master ought to have allowed the expenses the defendant had been put to under the commission, notwithstanding the plaintiff had countermanded his notice of trial in due time; and with respect to the brief and counsel fees, that the Master should allow no disbursement to counsel with brief, nor any charge with brief, which should appear either not to have been actually incurred, or to have been needlessly incurred.—*Pegg, demandant, v. Pegg, tenant*, 220. (See *Pegg v. Pegg*, *Chamber Reports*, July No. p. 190.)

COMMITMENT.

See "Magistrate," 1.

CONTRACT.

See "Agreement," 2.

See "Evidence," 5, 14.

Consideration. Common informer. Compromise of penal action. Leave of Court.] Where it clearly appears on the face of

the declaration (which was not so apparent in this case—see judgment), that the consideration of the defendant's promise was a compromise, without the leave of the court, of a penal action, brought by the plaintiff as a common informer, against the defendant, the consideration will be held to be illegal and the declaration bad.—*Hart v. Meyers*, 416.

CONTRIBUTION.

See "General Average," 1.

1. *Loss of goods. General average. Who liable to contribution.*] The owners of goods stored under the deck of a vessel are not liable to contribute by way of general average to the loss of goods laden on deck, and thrown overboard from necessity in a storm; and with the hope of saving the ship and cargo. *Semble*, that the ship-owner would in such a case be liable to general average.—*Gibb v. McDonell*, 356.

CONVICTION.

1. *Conviction by magistrate quashed.*] *Held per Cur.*, that a conviction was bad, in omitting, 1st, any statement of the information; 2ndly, the summons and appearance, or default of the accused; 3rdly, his plea denying or confessing; 4thly, the evidence. Also, in not shewing that any toll was claimed, or what toll, or how imposed; or that any could be claimed or imposed by reason of the completion of the road or any part of it. Also, because it did not appear therein that the defendant had proceeded on the road with any *carriage or animal liable to pay toll*, and after turning out of the road had returned to or re-entered it with such carriage or animal beyond a toll-gate, without paying toll, whereby payment was

evaded.—*The Queen v. Haystead*, 9.

COPARCENERS.

1. *Their right to sue each other in account.*] *Semble*, that coparceners, not coming within the stat. 5 Anne, ch. 16, sec. 27, cannot sue each other in an action of account. The point, however, was not expressly decided, as the court held that in this case the facts shewed that the defendant entered into possession of the land not as a coparcener claiming through his wife and in privity with the plaintiff, but as an executor claiming adversely to the plaintiff, without his consent; and that on that ground, the action of account would not lie.—*Gregory et ux. v. Connolly*, 500.

COSTS.

See "Practice"—(passim).

COVENANT.

See "Award", 4.

DAMAGES.

1. *Action for mesne profits. Discretion of jury as to.*] In an action for mesne profits, the jury gave a verdict for nominal damages, and the court were moved by the plaintiff to set aside the verdict as perverse and contrary to law. Evidence was given at the trial that the defendant had made substantial improvements on the lot from which he had been ejected, and there was also evidence of the costs of the ejection suits; but held *per Cur.*, that the damages were in the discretion of the jury, and that the damages and costs of the ejection might be considered as paid for by the improvements—and the rule was discharged.—*Patterson v. Reardon*, 326.

2. *How estimated in trover.*]

In an action of trover, the general principle of law (though not an inflexible one) is, that the jury can give no more in damages than the value of the goods at the time of the conversion: Where, therefore, logs had been taken to the defendant's mill and sawed there, and the plaintiff, acting under a supposed claim of right, refused to deliver them to the defendant. It was held *per Cur*, that the plaintiff was not entitled to the value of the logs in the state of sawed lumber, or to an expense incurred in sending a steamer and barges for the lumber.—Morton & McGhee v. McDowell, 338.

DEBT.

See "Verdict," 4.

1. *Debt. Collateral undertaking.*] Debt on simple contract does not lie on any collateral or conditional undertaking only.—McLean v. Tinsley, 40.

2. *Debt on simple contract. Consideration must move to debtor himself.*] To support an action of debt on a simple contract, it must appear that the contract has been entered into for a consideration moving to the debtor himself, and not as an assumpsit for a consideration moving from the plaintiff to a third party.—*Id.*

DEDICATION.

1. *What constitutes a dedication to the public.*] A dedication of land to public use takes effect from the intention of the person making it; and the merely opening or widening a street for the convenience or benefit of the person doing it and permitting the public to use it, will not constitute a dedication. The question of dedication or no dedication must now be left as a question of fact

for the jury.—Belford v. Haynes, 464.

DELIVERY ORDERS.

1. *Delivery orders for wheat in warehouses. Their nature and effect. Liability of seller to purchaser of wheat, upon warehouseman actually refusing to deliver.*] Where A., having 217 bushels of wheat stored in B.'s warehouse, gave C., who had paid the price of the wheat, a delivery order upon the warehouseman B., and B., upon the delivery order being presented, refused to deliver the wheat to C. until he (the warehouseman) had been previously satisfied a demand of his own, against C., wholly unconnected with the transaction between A. & C.—*Held, per Cur*, that upon such refusal, C. could sustain an action against A. for the non-delivery of the wheat; the delivery order, when given to the purchaser, not being an actual delivery of the wheat but merely an evidence in the hand of the seller that he had the wheat in B.'s warehouse, and, in the hand of the purchaser, that he had the right to demand the wheat from B.—Proudfoot v. Anderson, 573.

DISTRICT COUNCIL.

1. *Liability of District Council to individuals for not keeping steps of District Court House in repair. Stat. 10 & 11 Vic. ch. 6.*] Under the provincial statute 10 & 11 Vic. ch. 6, a district council cannot be made liable in damages for an injury, resulting in death, occasioned to an individual in walking up the court-house steps, which had been allowed to fall into an unsafe and dangerous condition. The council was charged in this declaration as having the court-house under their

control and as bound by law to keep it in repair; and judgment was arrested on this averment, as the act 4 & 5 Vic. ch. 10, sec. 46, throws the responsibility of keeping the court-house in a proper state of repair on the district surveyor, upon whose report, in the first instance, as to the necessity of the repair and the expense, the council have to pass a by-law.

Quere—Would the council be liable to an individual for not passing such a by-law after the report of the surveyor had been submitted?—*Hawkeshaw, administratrix of Hawkeshaw, v. The District Council of the District of Dalhousie*, 590.

DISTRESS.

1. *Right of landlord to distress where the lease expired.*] A landlord cannot distrain where his interest in the estate has expired before the distress.—*Hartley et al. v. Jarvis*, 545.

DOWER.

1. *Dower. Statute of Limitations. When it commences.*] The right of dower being only an inchoate right during the lifetime of the husband, the Statute of Limitations does not begin to run till the husband's death.—*McLellan and wife v. Meggatt et al.*, 31.

2. *Wife's right to, in land exchanged.*] A wife cannot be endowed of land given in exchange, and also of land taken in exchange; but she has her election to have the one or the other.—*McLellan and wife v. Meggatt, Ness & Reid*, 554.

EJECTMENT.

See "Evidence," 8.

1. *Right of party in possession to maintain, against party having the legal title.*] A.B. is let into

possession of land by C. D., upon an agreement to purchase, with the understanding that he is to remain in possession until he makes default in the payment of his instalments. A. B. afterwards, without making any default, lets C. D. into possession, upon an express condition, however, that he (C. D.) is to restore to him (A. B.) the possession, if a certain state of things should occur. The event upon which A. B. is to regain possession under this agreement happens. C. D., nevertheless, retains the possession, and A. B. brings his ejectment: *Held, per Cur.*, that under these facts, A. B. being entitled to the possession, could maintain his ejectment against C. D., though he had the legal title.—*Doe dem. Barker et al. v. Crosby*, 202.

2. *Right to possession of any part of land sued for, entitling to verdict.*] In ejectment, where the plaintiff proves his title to the possession as to any part of the premises sued for, he must obtain a verdict; and the court will not go into the question of boundary, in order to determine the precise quantity of land he is entitled to recover.—*Doe dem. Sheldon v. Ramsay et al.*, 446.

3. *Mistake in covenant. Rule. Amendment. New trial.*] Where it turns out that the defendant, from inadvertence, has admitted himself in the consent rule to be in possession of some of the land to which the lessor of the plaintiff is clearly entitled, and so has had a verdict pass against him, the court will grant a new trial on payment of costs, with leave to amend the consent rule.—*1b.*

4. *Township of Binbrook. Erroneous survey. Acts 1 Wm. IV. ch. 8, 7 Wm. IV. ch. 59, remedy.*

ing same. Married woman owning land in Binbrook.] Under the statutes 1 Wm. IV. ch. 8, and 7 Wm. IV. ch. 59, passed for the purpose of remedying an erroneous public survey—an inhabitant living in the front concession of the township of Binbrook, cannot be dispossessed by an ejectment brought, after a prior submission to arbitration, by the husband of a married woman owning land in the adjacent township of Saltfleet—the husband not being the owner of the land—to whom alone these acts apply.—Doe dem Crooks v. Ten Eyck, Doe dem Crooks v. Calder, 581.

5. *Ejectment. Placita, Jurata, &c.*]—The new rules of Hilary Term, 13 Vic., do not dispense with the *placita, continuances, jurata, &c.*, in the record of an *action of ejectment*.—Doe dem. Burnham v. Simmonds, 598.

ESCAPE.

1. *Declaration for an averment as to return of writ.*] *Seemable*, that it is not necessary in declaring for the escape of a defendant surrendered before judgment, to shew whether it was before or after the return of the writ. — Shouldice v. Fraser, sheriff, 60.

FEME COUVERTE.

1. *Necessity of a married woman, when entitled to the fee of land, being examined as the law requires. The effect of her non-examination as to passing the interest of wife or husband in land during coverture or afterwards.*] Under either of the provincial statutes, 43 George III. ch. 5, 59 George III. ch. 3, or 1 Wm. IV., ch. 2, a deed professing to convey a married woman's estate, executed by her jointly

with her husband, but containing no certificate on it of the wife having been examined as the law requires—is ineffectual to bar either *the wife or her husband* during coverture or afterwards.—Doe dem. Dibble v. Ten Eyck, Doe dem. Dibble v. Menzies, 581.

ESTOPPEL.

1. *Cognovit by bankrupt, how far an, as to assignees disputing its validity.*] Where a cognovit has been given by a bankrupt in fraud of the bankrupt law, and is therefore, with all steps taken under it, void, the assignees of the bankrupt, in bringing an action against the sheriff, must be looked upon as contending for the interests of the creditors, and not merely as representing the person or estates of the bankrupt; they therefore will not be estopped, as the bankrupt might, from disputing the validity of the cognovit and subsequent proceedings on the ground of fraud.—Ponton, assignee of Riddell, a bankrupt, v. Moodie, Sheriff, 301.

2. *Endorser, how far estopped from denying the competence of drawer to draw bill, or signature.*] The endorser of a bill is estopped by the fact of his endorsement from denying either the signature of the drawer or her competence (being a *feme couverte* in this case) to draw the bill.—Ross et al. v. Dixie, 414.

3. *As between grantor and grantee—denial of seizin.*—The grantee, by taking a title from the grantor, does not therefore estop himself from denying that his grantor was legally seizee.—Dittrick v. O'Connor, 448.

4. *Estoppel by verdict—Set-off.*] Where A. B. is sued by C. D., and is seeking to set-off a

demand for which he has already sued A.B., and has had a verdict—*Held per Cur.*, that he is estopped by such verdict from bringing the same identical demand a second time before the jury by way of set off.—*Russell v. Rowe*, 484.

EVIDENCE.

See “*Sheriff*,” 5; “*Fieri Facias*,” 1; “*New Trial*” 4, 8.

1. *As to certain facts being badges and not conclusive proofs of fraud.*] The fact that a bill of sale while importing on the face of it to be an absolute bill of sale is in truth only a mortgage, and the further fact that the vendor after the sale is allowed to remain in possession of the goods, are both badges of fraud, to be weighed by a jury—not proofs of fraud so conclusive as to leave the jury no alternative but to find fraud, whether they believe it or not.—*Hunter v. Corbett*, 75.

2. *Notice of action against magistrate—Proof of service.*] *Held per Cur.*, that the following evidence of a bailiff, as to the service of a copy of the notice of action against a magistrate—“He and two other persons held the respective papers while they were read and compared; but having allowed the plaintiff’s attorney to keep in the meantime the original, with which the copies were thus compared, and having omitted to place any mark on it by which he could identify it, he could not venture to swear with certainty on the trial that the papers which he served were copies of that document,” was sufficient to go to the jury to prove a service.—*Byrnes v. Wild & Ellis*, 104.

3. *Will. Mis-description of lot. Parol Evidence.*] *Held per Cur.*, upon the following will—“Know ye that I, Michael Lowry,

do bequeath all and every part of my real property situated in the township of Huntley, viz.” &c.—that parol evidence (notwithstanding that the words of the testator in the will doth “bequeath all and every part of this real property in the township of Huntley,” were not used with reference to his sons Edward and Samuel), was admissible, to shew that the testator did not own 26 but 22 in the 6th concession of Huntley; and that (it appearing upon such evidence that lot 26 had been inserted by mistake in the will for lot 22) lot 22 would pass under the will.—*Doe Lowry v. Grant*, 125.

4. *Where title of near relative shewn, what evidence necessary to displace that title by one of nearer heir.*] To displace title made under near relative capable of inheriting, it should be shewn that there is some one in existence representing the alleged elder branch of the family.—*Doe on several demises of Park, of Hunt, and of Henry Desrivieres and his wife, and of Austin Cuvillier and his wife, v. Reuben Henderson*, 182

5. *Parol evidence cannot control written contract.*] The defendant agreed that upon the plaintiffs’ assigning to him a life policy of insurance for 5000*l.* sterling, he would pay them 6000*l.* currency; and in suing the defendant for the nonpayment of the 6000*l.*, the plaintiffs averred that the policy which the defendant was to receive was one for 3000*l.* only, and not for 5000*l.*, and that he (the defendant) well knew it. On demurrer to this averment, the court held the declaration bad, upon the general principle of law, that the terms of a written contract could not be varied or con-

trolled by parol testimony.—*Bank of Upper Canada v. Boulton*, 236.

6. *Sufficient to support a demand and refusal in an action of trover.*] Where the solicitor of the plaintiff went to the Bank of Upper Canada and demanded from the President of the Bank certain boats, and the President told him he had no answer to give, and referred him to the solicitor of the Bank, to whom he went, and was told by him that he was not authorized to give any answer: *Held per Cur.*, that upon these facts, sufficient evidence was given of a demand and refusal to support an action of trover.—*McDonnell et al., Assignees of Donald Bethune, a bankrupt v. The Bank of Upper Canada*, 252.

7. *Printed Law in foreign country. How it may be proved.*] *Semble*, that it is now settled in England, that the printed law of a foreign country may be proved by *vivâ voce* of a witness.—*Short v. Kingsmill and Davis*, 350.

8. *Ejectment. What evidence necessary in cases of disputed boundaries.*] In all ejectments brought on account of disputed boundaries, the plaintiff has to shew, beyond any reasonable doubt, that he is entitled to some land at least of which the defendant is in possession. Where the point is a doubtful one, the plaintiff must be prepared to shew that he has had a survey carefully made, and that the proper steps have been taken which the law requires for ascertaining the exact position of any posts along the line which can still be discovered by inspection, or can be established by evidence, in order that the court and jury may see whether the two lots in question are, by the proof which the plaintiff is

seeking to establish, made to occupy their proper position on the concession line. *Semble*, that an admitted copy of the field notes from the Crown Land Office may be received in evidence.—*Doe dem. Strong v. Jones*, 385.

9. *Rebutting evidence, making out in fact a new case. How far to go to a jury.*] It does not necessarily follow, that because the plaintiff's witness, who has been recalled to rebut the evidence of the defendant, makes statements, which in fact amount to setting up a new case on the part of the plaintiff, the judge must therefore refuse to allow such statements to go to the jury.—*Devlin v. Crocker*, 398.

10. *Set off. Rejection of Letter.*] Where the defendant had been ordered to deliver particulars of any credit claimed by him, by the 17th of September, and he did not deliver them until the 26th of September; *Held per Cur.*, that he was restrained by such order from putting in evidence a letter from plaintiff admitting a set-off, in the shape of money received to defendant's use.—*Campbell v. Gzouski*, 412.

11. *Trespass. Justification by writ. Replication. Writ set aside. Answer to action.*] The plaintiff sued in trespass for false imprisonment—the defendant justified under a writ of *al. test. ca. sa.*; the plaintiff replied, that after the said writ issued, and before action brought, the writ was set aside by order of the court, and he then proceeded in his replication to state the grounds upon which the court had set aside the writ; the defendant rejoined, that it was not ordered that the said writ should be, and that the same was not set aside in manner and form as the

plaintiff alleged. *Held per Cur.*, that under these pleadings, the setting aside of this writ being in itself an answer to the defendant's justification, it was not incumbent on the plaintiff at the trial to go further, and prove that the grounds alleged in his replication were the grounds upon which the writ had been set aside.—Robertson v. Meyers, 423.

12. *Trespass. Arrest. Facts previous to arrest. Oppressive conduct. Damages.*] In an action of trespass for false imprisonment, where the defendant justified under a writ of *ca. sa.*, and the plaintiff replied, that it had been set aside before action brought, the judge of *nisi prius* allowed the plaintiff to go into evidence of facts and circumstances previous to arrest, with a view of shewing the oppressive conduct of the defendant in issuing the *ca. sa.*; and *Held per Cur.*, upon a rule for a new trial, that such evidence was admissible as affecting the damages, though not the right of action.—*Ib.*

13. *Original judgment of court in setting aside ca. sa.*] *Held* also, that the counsel for plaintiff had a right to read at the trial from the original judgment of the court in discharging the plaintiff from arrest, and setting aside the *ca. sa.*, the grounds upon which the *ca. sa.* had been set aside.—*Ib.*

14. *Breach of contract. Set-off. Proof of demand.*] Though it may be necessary to prove a demand, where A. B. is suing C. D., as for a breach of contract in not delivering certain goods, &c., yet, where C. D. is suing A. B., and A. B. is setting off this breach against C. D.'s claim, it does not follow that the same demand must

then be proved.—Russell v. Rowe. 484.

15. *Parol Evidence. Promissory Note.*] Parol evidence is admissible to deny the receipt of value for a bill or note, but not to vary the engagement to pay the amount at the time specified.—Davis v. McSherry, 490.

16. *Bill. Several Endorsers. Notice.*] Where the holder is suing the drawer of a bill, upon which there have been several intermediate endorsers, it is not necessary for the holder to shew notice given from each endorser within the regular period; all that the holder is required to do, in the first instance, is to shew due notice to the party against whom he is proceeding.—Boyes v. Joseph, 505.

17. *Conversation prior to written agreement. Evidence of.*] Evidence of a conversation prior to the execution of a written agreement, cannot be received to alter its terms.—Gilpin v. Greene, 586.

EXECUTION CREDITOR.

See "Sheriff's Sale," 1.

EXECUTOR AND ADMINISTRATOR.

1. *Note. Death of Endorser. Promise by Executors. Necessity of stating promise in the declaration.*] If, however, the party sued be the executors of the endorser, instead of the endorser himself, and the note has become due after the death of their testator, a promise to pay by the executors must be stated in the declaration.—Bank of British N. America v. Jones et al., executors, &c., 166.

2. *Liability of Executors of sureties on defalcation of prin-*

cipal.] The executors of sureties are liable for the defalcation of the principal committed after the death of their testator, and even after notice given by the executors that they would not be liable.—The Queen v. Leeming et al., executors of Applegarth, 306.

3. *Power to sell or take the fee.*] Where the testator directs his executor, as soon as convenient after his death, to make sale to the best advantage of his estate, first for the payment of debts, and then to divide the surplus proceeds amongst his children: *Held per Cur.*, that the executor in such case takes no estate in the land, but merely a naked power to sell, the fee in the meantime descending to the children.—Gregory et ux. v. Connolly, 500.

FERRY, DISTURBANCE OF.

See "Action," 1.

FIERI FACIAS.

1. *Land. Sale. Judgment.* 5 Geo. II. ch. 7.] Land not being bound by a judgment for the purpose of sale, under the 5th Geo. II. ch. 7, but only by the delivery of the *fi. fa.* against lands to the sheriff, the time of such delivery should be proved by the purchaser under the sheriff's deed; and where this proof had been omitted, and a verdict had been given for the plaintiff, with leave to the defendant to move for a nonsuit, the court declined nonsuited the plaintiff, but gave him a new trial on payment of costs.—Doe dem. Burnham v. Simmons, 196.

2. *Right of execution creditor to assist sheriff's vendee by issuing alias fi. fa., his debt having been paid in full.*] Where

the execution creditor had been paid his debt in full in 1840, by the assignee of the sheriff's vendee of land, sold under a *fi. fa.* lands, the court set aside an order in chambers obtained by the attorney for the assignee, and, as if at the instance or with the consent of the execution creditor, for the issuing an alias *fi. fa.* against lands in 1849 against the execution debtor, holding that it was not competent for the execution creditor, at that distance of time, to elect to consider his debt as unsatisfied, and to act upon the assumption that the person who paid it did not make the payment in privy with his debtor.—Bank of Upper Canada v. Murphy, 328.

3. *Seizure, what considered an abandonment of.*] The sheriff, on the 15th of April 1835, received a writ of *fi. fa.* against lands, and on the 10th of May 1836, he sold some of the defendant's lands under it; other portions of the land, though included in the sheriff's advertisement published previously to that sale, were not sold. There being no adjournment of the sale or any postponement from time to time, or any new advertisement, the sheriff, in December 1838, suddenly takes up this old writ issued in 1835, and proceeds to sell under it the lands unsold in 1836;—but *held, per Cur.*, that the seizure under the writ of 1835 must be considered as abandoned and the sale of 1838 void.—Doe dem. Cameron v. Robinson et al., 335.

FIXTURES.

1. *What are. Vendee of land in possession under contract to purchase. Owner of soil. Trespass.*] A building put up by a vendee of land in possession un-

der a contract to purchase, which is found by a jury to rest upon a foundation in some parts let into the soil, and connected to the foundation by mortar, is a fixture, and being a fixture it belongs to the owner of the soil, and when wrongfully severed it becomes a chattel; and the defendants, who had at first removed it from the land into the highway, and afterwards took it away, committed a trespass in taking the plaintiff's (the owner of the soil) goods.—*Gasco. v. Marshall et al.* 193.

2. *What are.*] An engine fastened into and bolted upon a wooden frame, which was not merely laid on the ground but was let into it—the earth being displaced to let in the beams or timbers which supported or formed part of the platform—is a fixture and a chattel, for which trover might be brought; and it is not less a fixture because it could be taken down and removed without defacing or removing any part of the walls of the building within which the wooden frame is situate.—*Oates v. Cameron* 228.

FOREIGN COUNTRY.

See "Evidence," 7.

FOREIGN JUDGMENT.

1. *Evidence of. Seal of court.*] The mere exemplification of a foreign judgment, if properly proved to be under the seal of the court, is sufficient evidence of the judgment, without any further proof that the exemplification was compared with the original papers filed, or the roll.—*Warener et al. v. Kingsmill and Davis*, 409.

FRAUD.

See "Evidence," 1.

GAS COMPANY OF TORONTO.

1. *Stat. 11 Vic. ch. 14. "Assumpsit."*] Under the statute 11 Vic. ch. 14, the Consumers' Gas Company of Toronto may sue in assumpsit for calls; the remedy is not confined to debt.—*Consumer's Gas Company v. Nicholls*, 91.

GENERAL AVERAGE.

See "Contribution," 1.

1. *Owners of Vessel. Stranding.*] The owners of a vessel have no right to set up a claim to average on account of expenses occasioned by stranding, when the stranding was not voluntary: and it has been held "that the mere steering the vessel to a less dangerous place for stranding, when she is inevitably driving to the shore, is not a voluntary stranding.—*Gibb v. McDonell*, 356.

GENERAL ISSUE.

1. *What evidence may be given under.*] Where a magistrate is sued in trespass for an alleged illegal proceeding under the 4 & 5 Vic. ch. 26, he may give in evidence a tender of amends, under the plea of the general issue.—*Moore v. Horditch and Henderson*, 207.

GUARANTEE.

See "Bills of Exchange," &c., 20.

HEIR.

See "Evidence," 4.

1. *Liability on ancestor's covenant for good title.*] In this province (though not in England), the heir is only liable, on descent of lands, for the debts of his ancestor. He is not liable for unliquidated damages—as, for instance, upon his ancestor's co.

venant for good title.—Vankoughnet v. Ross, 248.

INFANT.

1. *Deed made by, whether void or voidable. Effect of an ejectment by, as to avoiding.*] A deed of bargain and sale made by A., when an infant, is not absolutely void, but voidable by him either before or after he comes of age. The bringing of an action of ejectment by A. to regain possession of the land, contrary to his deed, is so complete an avoidance of the deed, that it cannot afterwards be confirmed or set up by any subsequent deed or act of A.—Doe dem. S. Jackson and C. Garrion v. Woodruffe, 332.

INDEMNITY BOND.

1. *Attornies compelled to sign Bond of Indemnity to Sheriff.*] The court ordered, upon an application by sheriff, that A. and B., attornies, &c., should, upon the following paper having been given by them to the sheriff:

Q. B.

Wilson et al. v. Hastings.

The plaintiffs will indemnify the Sheriff on selling goods of Hastings under *ven. ex.* (Signed)

SMITH & HENDERSON,

Attornies for Pltff.

Kingston, February 24, 1847.

enter into, by a day named, or procure two sufficient parties, to enter into a Bond of Indemnity to the sheriff, to be dated the 4th of March, 1847, with the usual conditions to indemnify, according to the facts as they existed at that date—the parties, &c., to be approved of by the master; otherwise, that A. and B. should pay to the sheriff the damages, &c., (see order in full), he had sustained by reason of selling Hastings' goods under the writ of *ven. ex.*—Corbett, sheriff, v. Smith and Henderson, 13.

INNKEEPER.

1. *Common Law. Relation between Innkeeper and Traveller. Right of action by Traveller.*] Where a traveller is shewn to have come to an inn as a guest, to have been so received by the landlord, to have stayed there six weeks, and to have paid for his board by the week, two days in advance: *Held per Cur.*, that if dismissed abruptly without cause, he has under these circumstances, a right of action against his landlord on the common law relation of innkeeper and guest. To put an end to this relation, the traveller must be shewn to have rented a certain apartment in the inn as tenant for a certain time.—Whiting v. Mills, 450.

INSURANCE.

See "Marine Policy," 2.

INTENDMENT.

See "Bond," 1.

INTERPLEADER ACT.

1. *Feigned issue. Nonsuit.*] A plaintiff may be nonsuited on the trial of a feigned issue under the Interpleader Act.—Bresson v. Claudinan, 198.

IRREGULARITY.

1. *Mistake in the teste of venire facias. Record. Process to Coroner.*] A mistake in the teste of the *venire facias*, inserting the 13th year of the reign, instead of the 12th, is not an irregularity appearing on the record, but in the process issuing to the coroner to summon the jury, and is therefore no ground to set aside the verdict for irregularity.—Culbert v. Conger, 389.

2. *Partners. Notice of trial. Record.*] *Semble*, that a notice of trial cannot be said to be irregular,

because A., one of two partners as attornies, signs the notice of trial as the plaintiff's attorney, although B., the other partner, appeared as the attorney on the record, there having been no order to change the attorney.—*Gamble et al. v. Rees*, 406.

3. *Notice of trial. Issues. Record. Assessment.*] Where the notice of trial is to try the issues and assess the damages, and there are in fact no issues on the record to be tried, the notice of trial as to the assessment is not therefore irregular.—*Id.*

JOINT STOCK COMPANY.

1. *Proposed joint stock adventure.* *Where a party paying in on account may recover back his money, as for a failure in forming the company.*] A party contributing to some joint stock adventure, which does not go into effect, may be allowed to recover back his money, in an action for money had and received; but the court must, in each case, see the circumstances which give him a just right to reclaim his money. The court held, that in this case no such right was shewn.—*Gilpin v. Greene*, 586.

JOINT-TENANT.

1. *Action of account as between joint tenants or tenants in common.* 5 *Anne*, ch. 16.] Under the statute, however, 5 *Anne*, ch. 16, one tenant in common or joint tenant, may be sued as bailiff in an action of account whenever he has entered and taken more than his just share of the profits, whether by appointment of his cotenant or not.—*Gregory et ux. v. Conolly*, 500.

2. Joint tenants in bringing ejectment may sever in their de-

mise.—*Doe Barwick et al. v. Clement*, 549.

JUDGE.

Judge of County Court—see "Arrest," 1.

Judge of Surrogate Court—see "Arrest," 2.

1. *Facts judicially known not brought out at trial, judge's right to comment on.*] *Semble* also, That the judge at the trial, before whom the *ca. sa.* had been set aside after argument in chambers, with consent of parties, as if by the full court in term, and to whom the facts upon which the writ had been set aside had thus become judicially known, had a right to comment to the jury upon some of those facts which had been left uncontradicted as well upon the trial as on the application in chambers, although such facts had not been again expressly brought out by the plaintiff in his evidence before the jury; in this case however, the facts thus stated by the judge were afterwards withdrawn by him from the consideration of the jury.—*Robertson v. Meyers*, 424.

1. *Authority of, in vacation, to commit debtor on limits to close custody.*] A judge, when applied to in vacation under the act 4 *Wm.* IV. ch. 10, sec. 4, for the commitment of a debtor on the limits to close custody, disposes of the case without the power of appeal by declining to interfere.—*Shaw et al. v. Nickerson, Gillespie et al. v. Nickerson*, 541.

JUDGE'S ORDERS.

1. *Power of Judge to open an order he had granted.*] A judge sitting in chambers has authority in his discretion to open again an order which has been granted by

himself, or even to rescind it before it has been carried into effect, upon his discovering that he has made it inadvertently, or that he has been surprised into making it by any perversion or concealment of facts, or from any misconception on his part of the law or facts.—*Shaw et al. v. Nickerson, Gillespie et al. Nickerson, 541.*

JUDGMENT AS IN CASE OF NONSUIT.

See "Commission to examine Witnesses," 1.

JURY.

See "Damages," 1.

1. *Writ of trial only to try issue. Assessment of damages by.*] Where the writ of trial is only to try the issue, and contains no special venire to assess damages, the jury have no authority to assess damages on breaches suggested.—*Hunter v. Vernon 552.*

JUSTICE OF PEACE.

See "Magistrate," 1, 2.

LACHES.

See "Bills of Exchange and Promissory Notes," 19.

LANDLORD & TENANT.

See "Pleading" 16.

1. *As to landlord prejudicing his claim for rent.*] The circumstance of a landlord having joined in giving a bond that the goods distrained should be forthcoming for the purpose of being sold upon *fi. fa.*, will not prejudice his claim for rent; neither will his claim be prejudiced by his having distrained as landlord, and by afterwards having abandoned the distress; nor even by his bidding at the sale of the goods.—*Brown v. Ruttan, sheriff, 97.*

LIMITATIONS, STATUTE OF

See "Dower," 1.

1. *Operation of. Actual occupation of land claimed under.*] To enable the Statute of Limitations to operate in bar of the true title to land, there must be an actual occupation to the exclusion of the real owner: Where, therefore, a party, having permission given him to occupy the west half of the lot, did confine himself, so far as residence and cultivation went, to that half, and only committed depredations on the other half: it was *Held, per Cur.*, that he could not be considered as having exclusive possession of both halves.—*Doe dem. Angus McDonell v. Rattray, 321.*

2. In 1822, A., a maniac, conveyed land to B., who then entered into possession. A. died in 1826. C., his eldest son and heir, became of age in 1829. He died in 1829, and his brother and heir D. (the lessor of the plaintiff), became of age in 1831, and brought his ejectment against B. on the ground that his father was *non compos* at the time of his executing the deed in 1822. D. brought his action more than ten years after the lunatic died, and after he himself came of age, and more than five years after our statute 4 Wm. IV. ch. 1; *Held, per Cur.*, that D. under these facts, was barred from recovery by the Statute of Limitations; and *Held also*, that B. could not be considered in possession as the servant or bailiff of the lunatic.—*Doe dem. Silverthorne v. Teal, 370.*

LIQUIDATED DAMAGES.

See "Penalty,"

LOWER CANADA.

1. *Circuit Judge. Act 7 Vic. ch. 18, sec. 16. Married Women.*] A circuit Judge in Lower Canada, under the act 7 Vic. ch. 18, sec. 16, has the power of examining married women respecting their consent to convey their estate.—Doe on several demises of Park, of Hunt, and of Henry Desrivieres, and his wife, and of Austin Cu-villier, and his wife, v. Reuben Henderson, 182.

MAGISTRATE.

1. *Power of commitment by, for contempt. As to appeal on the facts.*] While a power resides in any court or judge to commit for contempt, it is the power or privilege of such court or judge to determine on the facts, and it does not belong to any higher tribunal to examine into the truth of the case.—In re A. W. Clarke and W. H. Heermans, committed for contempt, 223.

2. *Power of commitment by, for contempt. Formality necessary.*] A justice of the peace, while sitting in the discharge of his duty, has the power, without any formal proceeding, to order at once into custody and cause there moval of any party who, by his indecent behaviour or insulting language, is obstructing the administration of justice; but he has no power either at the time of the misconduct, much less on the next day, to make out a warrant to a constable and to commit the offending party to gaol for any certain time by way of punishment, without adjudging him formally, after a summons to appear for hearing, to such punishment on account of his contempt, and making a minute of such sentence.—In re A. W. Clarke and W. H. Heer-

mans, committed for contempt, 224.

MALICIOUS ARREST.

1. *Case for. Averments in declaration.*] In the third count of a declaration in case for a malicious arrest, the plaintiff charged the defendant with maliciously causing the writ to be endorsed for a larger sum than warranted by the judgment, but he did not aver a want of probable cause for endorsing the writ for the amount mentioned, nor did he lay any precise day on which the arrest was made, nor did he aver that the defendant maliciously caused the plaintiff to be arrested. *Held per Cur.*, declaration bad upon all these grounds.—Ackland v. Adams, 139.

MANDAMUS.

See "School Trustees," 2.

1. *To county court. When it will be issued.*] Where, in matters of tort relating to personal chattels, the question of title to land shall be brought in question, though incidentally, the judge of the county court has no jurisdiction under 8 Vic. ch. 13, sec. 6. The court will only grant a mandamus to the judge of the county court in cases where there is no doubt of his jurisdiction.—Trainor v. Holcombe, 548.

MARINE POLICY.

1. *As to care and skill of captain invalidating, with respect to cargo insured and the vessel.*] *Sem-ble*, that with respect to the cargo insured, as well as the vessel itself, a marine policy may by an express (though not by an implied) agreement become legally invalid, from the want of care and skill on the part of the captain and crew in navigating the vessel; and *semble*,

that the wording of this policy amounted to such express agreement.—*Gillespie et al. v. British America Fire and Life Assurance Company*, 108.

2. *Seaworthiness. Particular navigation. Forfeiture.*] *Sem-ble*, that upon the general principles of the law applicable to the construction of marine policies, the seaworthiness of a vessel is a fact to be considered with reference to the particular navigation in which the loss of the vessel may occur—as, for instance, if a vessel insured between Toronto and Quebec were lost by stranding in the river St. Lawrence, the question for the jury to determine would be, not was she well found and seaworthy for the navigation of the open lake Ontario, but was she well found and seaworthy for the navigation of the river St. Lawrence; and if in the opinion of the jury she was suitable for the river navigation, though clearly not so for the lake, the policy will not be vitiated—unless it be so framed as to leave no doubt that the intention of the parties was to make the unseaworthiness of the vessel for either navigation, without reference to the particular navigation in which the loss should occur, an absolute cause of forfeiture.—*Gillespie et al. v. British America Fire and Life Assurance Company*, 108.

MISDIRECTION.

See “*Sheriff’s Sale*,” 1.

MESNE PROFITS.

See “*Damages*,” 1.

TENDER OF AMENDS.

See “*General Issue*,” 1.

MISJOINDER.

1. *Declaration. 1st count in*

Assumpsit. 2nd in Tort.] *Held per Cur.*, that the first special count in this declaration was in assumpsit, and the second in tort, and that there was therefore a misjoinder in counts.—*Quinn v. The School Trustees*, 130.

MORTGAGES

Made on Sunday. 8 Vic. ch. 45, sec. 2.] The giving or taking *in security* on a Sunday is not void, as “a buying or selling” within the provincial statute 8 Vic. ch. 45, sec. 2.—*Wilt v. Nicholas Lai, senr., and Nicholas Lai, junr.*, 535.

MORTGAGOR, MORTGAGEE.

1. *Disseizin of Mortgagee, by Mortgagor’s possession.*] Neither the mortgagee nor his assignee can be disseized by the mortgagor continuing in possession.—*Deo dem. George Carey et al. v. Cumberland*, 494.

2. *Assignee of Mortgagor, through a sale by Sheriff, has possession. What effect as to Mortgagee’s right to sell.*] The assignee of a mortgagor’s interest, through the medium of a sheriff, after the mortgage has been satisfied, cannot be looked upon as a tenant at sufferance to the mortgagee; a conveyance, therefore, made by the mortgagee while such an assignee was in possession would be bad.—*Id.*

MONEY HAD & RECEIVED.

1. *On an agreement void as made on a Sunday. Right to recover it back.*] Where A. had received money upon an agreement to deliver timber to B., and afterwards refused to deliver the timber, and was sued by B. to recover the money back, it is no defence to such an action to shew

the agreement made on a Sunday and therefore void, under the act 8 Vic. ch. 45, for if void, that would be no reason why the money received under it should not be refunded.—*Vail v. Duggan et al.*, 568.

MONEY PAID.

1. *Declaration. Averment.*]

In declaring on the common count for money paid, it must be averred that the money was paid by the plaintiff to the defendant at his request.—*Aikin v. Howcutt*, 143.

NEW TRIAL.

See “*Fieri Facias*,” 1.

1. *Granting third new trial.*

Fraud.] Where the question of fact for the jury to decide is a question of fraud, and they have twice decided against the fraud and in favour of the plaintiff, the court will not, except in very glaring cases, grant a third new trial.—*Hunter v. Corbett*, 75.

2. *New trial obtained on merits. Technical objection on second trial.*] Where the defendant had obtained a new trial *on the merits*, and then, for the first time, at the second trial, objected that the plaintiff had misconceived his action and should have brought trover and not trespass, which objection was overruled at the trial, and subsequently pressed in banc: *Held per Cur.*, that they would not, under the circumstances, set aside a second verdict for the plaintiff on this technical objection.—*Ib.*

3. *Evidence. Finding of jury.*] The plaintiffs (the assured) sued the defendants (the insurers) upon a marine policy, for the loss of a vessel by stranding while navigating the River St. Lawrence. The jury, upon issues raised under the exceptions in the policy as to

the negligence and carelessness of the captain and crew in navigating the vessel upon the waters of the St. Lawrence, by which it was alleged that the loss of the vessel had occurred, and not by the ordinary perils of the navigation, found for the defendants; and *Held per Cur.*, upon a motion for a new trial, that upon the evidence the finding of the jury could not be disturbed.—*Gillespie et al. v. British America Fire and Life Assurance Company*, 108.

4. *Genuineness of endorsement. Doubtful evidence. Affidavits.*]

A verdict having been given for the defendant on an issue raised as to the genuineness of his endorsement on a note, the court, upon a consideration of the evidence and the affidavits, refused, in the exercise of their discretion, to grant a new trial.—*Maclem v. Dittrick et al.*, 144.

5. *Absence of Counsel. Affidavits.*] A new trial granted upon conditions as to payment of verdict and costs, which the plaintiff had recovered against the defendant (a sheriff), during the absence of his counsel.—*Martin v. Corbett, Sheriff*, 169.

6. *Ejectment. Surprise. Title. Estoppel.*] New trial granted to the defendant in ejectment, on the ground of surprise, the plaintiff claiming title by an estoppel, which the defendant was not prepared to meet.—*Doe dem. Yager and ex dem. Depue v. Stewart*, 174.

7. *Trover. Fraudulent transaction on plaintiff's own shewing.*] Where in an action of trover the court thought the jury should have treated the transaction as being on the plaintiff's own shewing *ipso facto* fraudulent, they granted a new trial, though the verdict was only for 11l. 10s. 0d.,

with costs to abide the event.—*Knowlson v. Conger, Sheriff*, 455.

NOTICE OF ACTION.

1. *What amounts to, under 4 and 5 Vic. ch. 26, sec. 40.*] The court held that the act requires a clear month's notice of action, exclusive of the first and last days.—*Dempsey v. Dougherty et al.*, 313.

NOTICE TO QUIT.

1. *Tenant asserting his right to fee.*] Where possession is demanded from a defendant in ejectment, and he, instead of claiming to be a tenant, asserts his right to the fee, he has no claim to a notice to quit as a tenant.—*Doe dem. McKenzie and of Wallace S. Fairman v. Warren Fairman*, 411.

NOTICE OF TRIAL.

1. *Irregularity in.*] A notice of trial, naming Friday the 19th of May, instead of Friday the 18th, is an irregular notice; but if the defendant intends to rely upon it as such, he must give notice to that effect to the plaintiff before the trial, otherwise the irregularity will be cured.—*Gordon v. Cleghorn*, 171.

2. *What good service of.*] *Sem-ble*, that the service of a notice of trial upon the agent of an attorney, who is himself the defendant in the action, and not representing another, is a good service.—*Bank of Upper Canada v. Robinson*, 478.

PARENT AND CHILD.

1. *Father's right to custody of child. Order of court, how obeyed by Mother.*] The order of this court, commanding the wife to deliver to the husband the body of their child, is sufficiently complied with by the wife placing the child in the charge of the husband. If the

child returns of her own will to the mother, and is not afterwards forcibly detained, the court will not further interfere.—*Rex v. Emma Matilda Sheriff*, 403.

PARTNERSHIP.

1. *What constitutes a partnership "inter se."*] *Held per Cur.*, that an agreement (given below) did not create between the parties a partnership *inter se*, and that, consequently, the one could sue the other on such agreement at common law without resorting to equity.—*Hawley v. Dixon et al. Executors of Dawson*, 218.

2. *Simple contract. Debt due by A. and B. Plaintiff takes mortgage from A., B. no longer liable.*] Where there is a simple contract debt due by A. and B., defendants, and the plaintiff takes a mortgage, giving time, from A., the simple contract debt is thereby extinguished as regards B.; and it follows, that B. is no longer liable to be sued on the implied assumpsit, as having been a joint contractor with A. *Quære*, where there are partners employed in making engines, &c., and the plaintiff makes an express contract with one of the partners for an engine, can he, notwithstanding such express contract with one only of the partners, afterwards sue them all?—*Loomis and Loomis v. Ballard and Welsh*, 366.

PENALTY.

1. *When a penalty. When liquidated damages.*] Where a party binds himself in an agreement to pay the plaintiff 25*l.*, if A. B. does not fulfil all the covenants and conditions of the agreement, the 25*l.* must be looked on as a penalty, and not as liquidated damages, giving the plaintiff an

action as for an absolute debt.—*McLean v. Tinsley*, 40.

PLEADING.

See "Bills of Exchange," &c., 8, 9 10; "Malicious Arrest," 1; "Money Paid," 1; "Variance," 6.

1. A declaration in trespass, charging the defendant with having caused the plaintiff to be assaulted and imprisoned, is good.—*Robertson v. Cooley*, 21.

2. *Debt on recognizance of bail.*] In debt, on a recognizance of bail, the declaration will be bad if it appears that the plaintiff is bringing his action in an outer district, upon a record of this court remaining in Toronto.—*Manning v. Procter et al.*, 22.

3. *Recognizance of bail taken in an outer district. Filing.*] In debt, on a recognizance of bail taken in an outer district, the declaration must shew the recognizance to have been filed in the district where it was taken.—*Ib.*

4. *Pleadings.*] Argumentative denial in plea of the agreement set out in the declaration.—*Dorland v. Bonker*, 23.

5. *Trover.*] In an action of trover, by assignee of a bankrupt against the defendant, the declaration laid the trover and conversion before the bankruptcy. The defendant, after pleading the general issue, justified under a judgment and execution against the bankrupt. The plaintiff replied that the judgment and execution were void under the bankrupt laws. The defendant demurred, and the court decided the replication to be well pleaded. It was therefore *Held per Cur.*, that, as the general issue was the only issue on the record at the trial, and as that issue merely went to

the fact of conversion, the defendant could not, in the absence of a special plea, be let into a justification under his execution.—*Brent, assignee of Draper, v. Perry*, 24.

6. *Replevin Bond.*] To an action against the sheriff for taking insufficient replevin bond, he pleaded that the goods replevied were worth no more than 15*l.* and that so the writ of replevin being sued out of the County Court was void, *Held, per Cur.*, plea bad.—*Kirkendall v. Thomas, sheriff*, 30.

7. *Joint debtors. Note of one no satisfaction of debt.*] The note of one of two joint debtors is no satisfaction of the debt; where, therefore, A. and B. being sued in assumpsit as jointly liable on the common counts, A. pleaded as to 20*l.* of the demand, that B. before action brought, for himself and A. made his note to the plaintiff for 20*l.* which the plaintiff then received and accepted for the 20*l.* and in *payment thereof*, and added, that the plaintiff afterwards endorsed this note, given to him by B. to persons unknown, who are still the holders thereof, and entitled to sue B. thereon: *Held, per Cur.* plea bad.—*Leonard v. Atcheson et al.* 32.

8. *Duplicity.*] The plea was also held bad as being double, and shewing a note not negotiable to make B. liable to a third party.—*Ib.*

9. *Promissory note.—Replication. Traversing endorsement to A. B. Demurrer.*] Declaration—endorsee against endorser of a note, averring an endorsement from defendant to plaintiff. Plea—that plaintiff endorsed to one A. B., who was still the holder. Replication—traversing the endorsement to A. B. Demurrer to

replication. *Held, per Cur.*—replication bad in not denying that A. B. was the holder of the note at the time of bringing the action.—*Bank of B. N. A. v. Ainley*, 33.

10. *Affidavit of due taking of recognizance. Averment of.*] The averment in the plea that the affidavit of the due taking of the recognizance or of the justification "was duly filed with the clerk of the district court" is sufficient.—*Shouldice v. Fraser, sheriff*, 60.

11. *Sheriff. Discharge of Prisoner. Plea. Perfecting of special bail.*] A sheriff cannot justify discharging a prisoner from his custody, surrendered to him by the bail to the sheriff before the return of the writ, by pleading the perfecting of special bail, without shewing at the same time that the plaintiff had notice of the special bail and of the justification.—*Shouldice v. Fraser*, 60.

12. *Note payable to maker's own order, how to declare on.*] A note payable to the maker's own order may be declared upon as a note payable to bearer; but to declare upon such a note that he (the maker) made an instrument in writing promising to pay to his own order, would be bad.—*Wallace v. Henderson*, 88.

13. *Averment as to time of endorsing. Demurrer.*] It is bad on special demurrer to aver that he (the maker) then—to wit, at the time of making this instrument, endorsed, delivered and assigned the same to A. B., who assigned it to the plaintiff.—*Wallace v. Henderson*, 88.

14. *Replication. Avowry. Nil habuit replied by stranger.*] A stranger, whose goods have been seized on the premises of a tenant and distrained for rent, cannot, any more than the tenant

himself, question the landlord's right to demise.—*Smith v. Aubrey*, 90.

15. *Stat. 11 Vic. ch. 14. Consideration. Averment of. Consumer's Gas Co.*] In declaring under the act, an averment of consideration to support the promises is not necessary; neither is it necessary to lay the promise to pay on any certain day. The general terms, that the defendant afterwards promised to pay, is sufficient.—*Consumer's Gas Co. v. Nicolls*, 91.

16. *Debt. Motion in arrest of judgment.*] In debt, on motion to arrest judgment on the ground that "it was not alleged that the goods, &c., were found by the plaintiff." *Semble*, that this objection would have been good on special demurrer.—*Kendrick v. Maxwell*, 94.

17. *Note. Argumentative plea of endorsement to plaintiffs.*] Where it is pleaded that both A. (the maker of the note) and the plaintiffs knew at the time that the note was transferred by A. (the maker) to the plaintiffs; that B., the endorser (who had endorsed the note before it was signed by the maker) had only agreed and intended to endorse a note that was to be made by C. and not one made by A.—*Held per Cur.*, that such a plea denied in effect the endorsement to the plaintiffs, and was therefore bad as being an argumentative plea—(*Sullivan J. dissentiente*),—*Rossin et al v. McCarty et al*. 100.

18. *Demurrer for misjoinders of Counts.*] A demurrer for a misjoinder of counts must go to the whole declaration: where, therefore, the defendant demurred to the second count of the declaration, and the plaintiff demurred

to the pleas to the first count—*Semble*, that upon the argument of the demurrers, the plaintiff could not object on exceptions taken to the first count of the declaration, that the whole declaration was bad for misjoinder of counts.—*Quinn v. The School Trustees*, 130.

19. *Action on note. Plea, failure of consideration, title being bad for which note given.*] To an action on a note, the defendant pleaded that he made the note on account of payment of a piece of land which the plaintiff then agreed to sell and convey to him, and to which the plaintiff then “professed to have a title”—whereas the plaintiff had not then or at any time afterwards any right in or to the said land, and could not and did not convey the same to the defendant pursuant to the agreement; and so that there never was any consideration for making the said note, except as aforesaid. *Held per Cur*—upon demurrer to plea—plea bad.—*Blanchfield v. Bidsall*, 141.

20. *Demurrer to replication concluding to the country.*] The defendant, though the replication completes the issue, may refuse to be concluded by it; and if he thinks proper, demur, provided he does so within the ordinary time of pleading.—*Gordon v. Cleghorn*, 171.

21. *Assumpsit. Plea of coverture.*] Where the defendant promises, that if the plaintiff would convey a certain property to Mrs. A. B. and take a mortgage from her for payment of the purchase money by a certain day, the money should be paid on that day: *Held, per Cur.*,—reversing the judgment of the court below—that an action of assumpsit would well

lie against the defendant on the non-payment of the mortgage, and that the plea of Mrs. A. B.’s coverture would be a bad plea; *Semble*, however, that such a plea would be a good defence where a promise of the defendant is set up in the declaration as founded on a consideration of plaintiff’s forbearance to sue a married woman for a debt alleged to be *personally due* by her.—*Nicholls v. McGill*, 233.

22. *Replevin. Avowry. Replication. Demurrer.*] To an action for replevin, the defendant avowed for a distress for rent due to him by one Culhaine on a demise, at a yearly rent, of which one year’s rent was in arrear on the 1st January 1850. The plaintiff replied to this, that the close on which the distress was made, and on which the rent accrued, was, at the said time when, &c., the close and freehold of him the plaintiff, and not of the defendant. The defendant demurred to this replication, as containing no answer to the avowry. *Held, per Cur.*, replication bad.—*Robertson v. Meyers*, 415.

23. *Declaration. Prayer for relief. Special demurrer.*] It is a good ground of special demurrer to a declaration, that it improperly concludes with a prayer for relief.—*Hart v. Meyers*, 416.

24. *Promise. Consideration. Averment.*] Where the declaration lays a promise to have been made in consideration that the plaintiff should forbear to prosecute a *qui tam* action, and yet does not aver that the plaintiff did forbear, the declaration is bad in substance.—*Ib.*

25. *Note. Special traverse to plea of plaintiff not holder.*

Replication. Demurrer.] To an action on a note by payee against maker, the defendant pleaded that before the commencement of the suit, &c., the plaintiff endorsed to A. B., who then became the holder of the note, and to whom, therefore, the plaintiff was liable. The plaintiff replied by re-affirming that he was the holder of the note, and specially traversing that A. B. was the holder as the plea asserted. The defendant demurred. *Held, per Cur.*, replication good.—Dickenson v. Clemow et al. 421.

26. *Trespass. Plea. Special demurrer.*] Where to a declaration in trespass, charging trespass committed on *divers* days, &c., the plea answered trespasses committed at the said time when, &c.: *Held, per Cur.*, plea bad on special demurrer.—Rees v. Dick, 496.

27. *Plea in bar. Actionem non. Prayer of judgment.*] A plea pleaded to part only of the cause of action, if *in bar* to that part, need not commence with the *actionem non* and conclude with the prayer of judgment.—Rees v. Dick, 496.

28. *Argumentative plea of not possessed.*] To an action of trespass for breaking down and entering the plaintiff's close and pulling down the fences, &c., the plaintiff pleaded that he was lawfully possessed of a close next to the plaintiff's close described in the plaintiff's declaration, which close of defendant the plaintiff claimed as part of his close mentioned in the declaration, and so, claiming it as his, wrongfully put up a fence there, and that the defendant took up the fence posts, &c., wrongfully encumbering his close, and removed them to a

convenient distance, as he lawfully might, &c. *Held, per Cur.*, on demurrer to this plea, plea bad, as being an argumentative plea of not possessed.—Rees v. Dick, 496.

29. *Argumentative and immaterial pleas.*] The defendant A. pleaded in his fifth plea that before the maturity of the drafts, which amounted in all to 1500*l.*, the plaintiffs *did receive* from Cummings, *to cover the same*, sundry large quantities of flour, amounting in the whole to 990 barrels, and did sell the same for a large sum—namely, 1657*l.* 5*s.* 9*d.*, and *much more than sufficient* to cover the amount of the said drafts so accepted, &c., and the said commission in the declaration mentioned. *Held, per Cur.*, on demurrer to plea, plea bad, in not averring *directly* that the plaintiff B.'s advances *were covered*, together with commission; and also, in tendering an immaterial issue, in pleading that flour was received *much more than sufficient to cover*, &c.—Le Mesurier et al. v. Sherwood, 530.

30. *Declaration. Common Count. Arrest of judgment.*] For that whereas the defendant on the 12th of July 1849, was indebted to the plaintiff in 100*l.* for meat, washing and lodging, goods, chattels and other necessities, then found and provided for one Elizabeth Maxwell, and at the defendant's special instance and request. On motion to arrest judgment on the following grounds—first, that it was not alleged that the goods, &c. were found *by the plaintiff*; secondly, or that they had been provided *on the credit* of the defendant: *Held, per Cur.*, declaration good after verdict—Kendrick v. Maxwell, 94.

Special demurrer.] *Semble*, that the first objection would have been good on special demurrer.—*Ib.*

31. *Denial of landlord's title at time of demise.*] Any plea to an avowry involving a denial of the landlord's title at the time of the demise is bad.—*Hartley et al. v. Jarvis*, 545.

32. *Pleading.*] In a declaration on the case for procuring without reasonable cause the plaintiff to be indicted at the court of Oyer and Terminer—averments, that the defendant on the 2nd of June went before a court holden on the 1st of June, and that the plaintiff was acquitted at Nisi Prius, on an indictment found by the court of Oyer and Terminer—were held bad.—*Ashford v. Goheen et al.*, 547.

33. *Attorney. Negligence. Declaration.*] A declaration against an attorney for negligence, is sufficient in stating generally that by the negligence of the defendants he (the plaintiff) lost his cause—it need not point out what the negligence consisted in.—*Vail v. Duggan et al.*, 568.

PRACTICE.

See “Appeal;” “Escape,” 1; “Verdict;” “Judge’s Orders,” 1.

1. *Taking exceptions to declaration on second demurrer to plea.*] After judgment has been once given on the record against the defendant upon demurrer to his pleas, and he has been allowed to add another plea, which when demurred to he abandons: *Held, per Cur.*, that he cannot be allowed on this second demurrer to take exceptions to the declaration, the court having already adjudged it to be good.—*George Hobson v. The Wellington Dis-*

trict Mutual Fire Insurance Company, 19.

2. *Notice of an exception to declaration. Court entertaining themselves an exception.*] Where no notice of an exception to declaration, after demurrer to plea has been given, the court will not entertain such exceptions of their own accord, unless the declaration shews that, on the facts stated, the plaintiff really has no ground of action.—*Shouldice v. Fraser, sheriff*, 60.

3. *Defendant not allowed to object to declaration from nature of demurrer.*] Where the defences were severally pleaded to the several counts of a declaration, and demurred to and not supported; and on the argument of the demurrer an exception was taken to the whole declaration that it was bad for a misjoinder of counts, the first and third counts being in assumpsit, and the second in case; the court, though they admitted the declaration to be bad for the reason assigned, would not give judgment against the plaintiff, the question upon the inconsistency of the declaration as a whole having been raised under the demurrer. — *McLeod v. Eberts et al.* 251.

4. *Election to take verdict on a certain count at trial. Verdict on different count. Evidence.*] *Semble*—That a party may apply his verdict to a different count from that on which he elected to take it at the trial, where the evidence given will support such count.—*Ponton, assignee of Riddell, a bankrupt, v. Moody, sheriff*, 301.

5. *Set-off, setting aside of.*] The court refused in this case, upon the facts therein stated, to

set aside summarily a plea of set-off.—Watt v. Buell, 307.

6. *Rule of court. Assessment of contingent damages. Record. Demurrer to declaration.*] A plaintiff cannot, under the 23rd rule of this court, made in Hilary Term last, assess contingent damages where there is nothing on the record but a demurrer to the whole declaration.—Elliott v. Wilson et al., executors of Robertson, 331.

7. *Notice of countermand. Rule nisi for judgment as in case of nonsuit set aside on the peremptory undertaking. Condition as to costs.*] Where the plaintiff had given notice of countermand, and the defendant obtained a rule nisi for judgment as in case of nonsuit, and the plaintiff discharged the rule on the peremptory undertaking, with the condition inserted, on paying not only the costs of the application but the costs of the day; and the plaintiff, without paying any costs, proceeded to trial: the court set aside the verdict without costs, on the ground that, though the plaintiff could not be compelled, where he had countermanded his notice of trial, to pay the costs of the day, and that the rule so far was insensible, yet that the conditions as to the costs of the application being good, the whole rule granted on the plaintiff's own motion could not be disregarded by him afterwards as a nullity.—Ross qui tam v. Meyers, 374.

8. *Nisi prius record. Blank for day on which judgment on demurrer. Setting aside assessment of damages.*] The fact that the nisi prius record contains a blank for the day on which the court pronounced judgment on

the demurrer, is no ground for setting aside the assessment of damages.—Gamble et al. v. Rees, 406.

9. *Record. Assessment of damages. Filing of judgment paper. Irregularity*] *Semble*, That in making up a record for an assessment of damages after judgment has been given on demurrer, the more proper course would be, before the record is made up, to file a judgment paper in the office; but if this is not done, the irregularity, if such, must be taken advantage of before damages are assessed—Ib.

10. *Record improperly made up. Objection, when entertained.*] The court cannot look behind the record, unless where the application is to set aside the record itself. An objection, therefore, to the record, as being improperly made up without proceedings to warrant it, cannot be entertained upon an application to set aside the assessment of damages.—Gamble et al. v. Rees, 406.

11. *Particulars of payment. Order to deliver.*] *Semble*, that it is not now the practice in England to give an order upon the defendant to deliver particulars of payment.—Campbell v. Gzouski, 412.

12. *Al. test. ca. sa. is still a ca. sa. Variance.*] An *al. test. ca. sa.* is still a *ca. sa.*; and therefore when a defendant justified under the alias, and the plaintiff replied that the said writ had been set aside, and then proved a rule of court discharging the arrest under a *ca. sa.*—*Held* no variance.—Robertson v. Meyers, 424.

13. *Leave to amend. Filing in lieu a special demurrer.*] Where a party who had obtained leave to amend his replication filed a spe-

cial demurrer in its stead, and a judge in chambers set the demurrer aside: *Held per Cur.*, upon an application to rescind the judge's order, that the judge had properly decided.—*The Gore Bank v. Chase*, 454.

14. *Objection waived at trial cannot be argued in banc subsequently.*] Where the defendant, at the trial, disclaiming any wish to succeed against the justice of the case, assents to the reception of parol evidence to prove the understanding on which a note was given, and a verdict is given against him, he cannot be allowed afterwards to argue *in banc* the technical objection he had waived at the trial.—*Davis v. McSherry*, 490.

15. *Costs. Condition of amendment.*] When, upon a demurrer and issues in fact, judgment is given in favor of the defendant on the demurrer, and the issues in fact are found for the plaintiff, the defendant cannot call upon the plaintiff to pay to him the costs of the trial of the issues, on which he failed, as a condition of his (the plaintiff's) being allowed to amend on the demurrer.—*Bank of B. N. America v. Ainley*, 521.

16. *Costs.*] Where separate actions were brought against the maker and endorsers of a note, and upon a demurrer by the defendant to the plaintiff's replication judgment was given for the defendant, and the plaintiff applied to amend, making but one application in the three cases: *Held per Cur.*, that the defendant was only entitled to the costs, as for one case, in attending to oppose the application to amend. *Held* also, that as to the ordinary fee disbursed to counsel, with brief to argue the demurrer in the *three* cases, and the ordi-

nary taxable costs occasioned to the defendant by the demurrer in *each* case, that they might be allowed to the defendant.—*Ib.*

17. *Appearance. Service of notice of writ of enquiry.*] Where the defendant is represented at the trial and has made his defence, the court will not set aside the proceedings, on the ground that no notice of the execution of the writ of enquiry had been given to the defendant.—*Farrish v. Shields*, 525.

18. *Remanet. Costs*] Where judgment was given for plaintiff on demurrer to defendant's pleas, with leave to defendant to amend his pleas on payment of costs, which costs were to include the costs of the day for the last assizes, the case having been made a remanet—the court, on discovering that the defendant had a cross action against the plaintiff at the same assizes (of which they were not aware at the time they gave their former judgment), and that the causes had by the consent of both parties been made remanets, allowed the amendments to be made on payment of the costs of the demurrer: and *semble*, that at any rate this would have been the proper course.—*McKenzie v. Gibson*, 527.

19. *Nonsuit.*] In an action of ejectment, brought against two tenants, the landlord obtained leave to join in a defence as a third party, but not availing himself of the order, the plaintiff made up his record against the two tenants alone. He gave notice of trial, however, in a cause as against the three—the two not confessing, &c., the plaintiff was nonsuited. An application was made in term to set aside the nonsuit; but, *Held per Cur.*, that under these circumstances, there was no necessity for

setting aside the nonsuit. The court, however, set aside the nonsuit on the terms mentioned in the case.—*Doe Murphy v. McGuire and Forrest, and Robertson*, 405.

20. *Proceedings taken in opposition to terms of rule of court. Mistake of clerk. Amendment.*] Proceedings cannot be sustained which are in direct opposition to the terms of the rule of court, though the terms of such rule be not in accordance with the order of the court, through a mistake of the clerk; and such proceedings cannot be supported by a subsequent amendment, for the effect of such amendment is not retrospective.—*Doe dem. Burnham v. Simmonds*, 196.

PRINCIPAL AND AGENT.

1. *Liability of Agent. Set-off. Remedy of Principal against.*] *Held per Cur.*, that the defendant upon the facts stated had no right to a set-off against the plaintiff upon the common counts; neither could he support a plea of payment, or accord and satisfaction; but, that if he had any remedy at all against the plaintiff, (and the court thought none existed), he should have brought a special action for negligence.—*Sword v. Carruthers*, 313.

2. *Power given to Agent. Stoppage in transitu.*] *Semble*, also, that in this case the defendant had not put it in the plaintiff's power to exercise any right of stoppage in transitu.—*Id.*

3. *When a Solicitor can be said to be an Agent. Payment.*] *Held per Cur.*, that under the circumstances of this case (as given in the statement and judgment below), the solicitor could not be considered the agent of the

plaintiff, so as to make a payment to the solicitor from the defendant a payment to the plaintiff.—*Proudfoot, as Trustee of the Home District Savings Bank v. Murray*, 456.

PROFERT.

Party founding his right of action on a deed, which must be presumed to be in his possession, must make profert of the deed.—*McLean v. Tinsley*, 40.

PROMISSORY NOTES.

See "Bills of Exchange and Promissory Notes."

RECEIPT.

1. *Construction of As to defendant's personal liability thereon.*] *Held per Cur.*, that the following receipt—"Received of Bradford and Cutler, a note they held against A Ladd, on which there was a balance due September 1st 1842, of \$400 33c., which is to be paid to them in Michigan treasury warrants; also, a balance of accounts of \$57 17c., which is to be paid in current money, if enough is collected; if not, in warrants: (Signed) Dennis O'Brien"—could not be considered on the face of it evidence of a promise by Mr. O'Brien personally to pay these debts.—*Bradford and Cutler v. O'Brien*, 562.

RECORD.

See "Verdict," 1.

1. *Repassing or resealing.*] Where the record, after having been made a remanet, had not been repassed or resealed, and was otherwise before the court in a slovenly state, the court set aside the verdict with costs: they bound themselves, however, to no inflexible rule on the subject of repassing and resealing.—*Lucas v. Peatman*, 20.

2. *Alteration of. Verdict set aside.*] Where a *nisi prius* record, when entered with the clerk of assize, terminated with a transcript of the pleadings, and contained no award of *venire*, no *jurata* or day of *nisi prius* given, and after it had been some days in this state was withdrawn from the clerk of assize by the plaintiff's attorney, and altered, by adding what was necessary, without leave; the court, upon application in term setting out these facts, set aside the verdict.—*Russel et ux. v. Graham*, 159.

3. *Clerical error. Verdict set aside.*] The court will not set aside a verdict for irregularity because an evident clerical defect has been altered on the record after it has been entered for trial.—*Culbert v. Conger*, 389.

REGISTRATION.

See "Will," 4.

RELEASE.

1. *Upon what it must operate to make it good.*] Where a party does not grant all his interest in the land to A. B., but merely gives up his right, this is a mere release, and to make it good, requires that the releasee should have a previous estate or interest in possession on which the release could operate.—*Doe dem. Michael Phelan v. Kinnally*, 480.

2. *Several obligors. Release of one. Its effect.*] A release by plaintiff to one of several obligors in a replevin bond to the sheriff, after assignment to the plaintiff, releases all, and releasing the sureties, the plaintiff has no right of action against the sheriff for taking insufficient sureties.—*Kirkendall v. Thomas, Sheriff*, 20.

RENT.

1. *Verbal Notice. Landlord. Sheriff.*] A verbal notice from the landlord to the sheriff will be sufficient to save the year's rent; and, if it can be shewn that the sheriff knew of the rent being due, a formal notice from the landlord would not be necessary.—*Brown v. Ruttan, sheriff*, 97.

2. *Landlord. Prejudicing claim for rent by distress, &c.*] The circumstances of the landlord having joined in giving a bond, that the goods distrained should be forthcoming for the purpose of being sold upon the *fi. fa.*, will not prejudice his claim for rent, neither will his claim be prejudiced by his having distrained as landlord, and by afterwards having abandoned the distress—nor even by his bidding at the sale of the goods.—*Ib.*

REPLEVIN BOND.

"See "Pleading," 6.

REVERSIONER.

1. *Interest of. Sale under fi. fa. Tenant for life.*] The interest of a reversioner may be sold under a *fi. fa.* against lands during the lifetime of the tenant for life.—*Doe dem. Cameron v. Robinson et al.*, 335.

RIGHT TO REPLY.

1. *Defendant's address to jury. Read his own letters.*] Where the defendant read to the jury letters of his own, addressed to the plaintiff's attorney, and commented upon them, the court refused on that ground to allow the plaintiff's counsel to reply.—*Alderson v Stewart*, 297.

SCHOOL TRUSTEES.

1. *Declaration. Teacher. Averment of agreement. Corporate*

seal.] In an action of assumpsit brought by a teacher against the school trustees, appointed by the act 9 Vic. ch. 20, setting out a special agreement to retain the plaintiff in the employment of a teacher, for one year, from, &c., at a certain salary, &c., founded upon a parol agreement, brought by the teacher, under the same statute, for wrongfully, and without cause, turning the plaintiff away, and preventing him thereby from earning his salary: it was *Held per Cur.*, that the declaration in both cases was bad, in non-averring the agreement to have been made with the defendants by their corporate seal.—*Quinn v. School Trustees*, 130.

2. *Stat. 9 Vic. ch. 20. Teacher. Payment. Mandamus. Special action.*] If the school trustees appointed under the act 9 Vic. ch. 20, decline to sign the order upon the superintendent for the payment of the teacher's money, as provided for by the act, they may be proceeded against by mandamus, or perhaps they may be sued in a special action for not making the order; but they cannot be sued in an action for the money, as that is not in their hands.—*Ib.*

3. *Power of. Teacher. Board and Lodging.*] *Semble*, that the school trustees have no power, under the act, to make an agreement for providing the teacher with board and lodging.—*Ib.*

SEDUCTION.

1. *When action for, will lie. Parent. Child residing with stranger.*] Under the provincial statute 7 Will. IV. ch. 8, seduction, followed by pregnancy, entitles parent, even before birth of child, and to the exclusion of any other party, to maintain this action,

although the daughter had from tender years been living in the family of a stranger, and continued there to reside up to the time of bringing the action. (*Draper, J., dissente*).—*L'Esperance v. Duchene*, 146.

2. *Felony. Evidence.*] Whenever, in a civil action for seduction, it turns out upon trial that the act complained of, was not merely a trespass, but a felony, the learned judge must direct an acquittal. *Held*, however, *per Cur.*, that in this case, the evidence being considered unsatisfactory, the learned judge was justified in not directing a verdict for the defendant.—*Brown v. Dalby*, 160.

SET-OFF.

See "Estoppel," 4.

SHERIFF.

See "Rent," 1.

1. *Answer to rule for an attachment.*] Where a sheriff returns *cepi corpus* to a writ of *ca. sa.*, and the plaintiff rules the sheriff to bring in the body; and, the sheriff not complying with the terms of the rule, the plaintiff then obtains a rule for an attachment against the sheriff for not bringing in the body of the defendant at the return of the rule to that effect: *Held, per Cur.*, that it is a good answer to such rule for an attachment, to shew by affidavit that the defendant was arrested under a *ca. sa.* and placed in close custody, and was afterwards discharged from close custody and admitted to the limits, by virtue of a certificate from the clerk of the crown and pleas annexed to the affidavit, and that he had not since been committed to close custody by any process whatever.—*White v. Petch and Manning*, 1.

2. *Conduct of Sheriff cannot be urged as a reason for refusing his application to obtain bond of indemnity.*] The court also held, that the conduct of the sheriff, affecting his right to recover, either in whole or in part, on the bond, could not be urged as a reason for refusing his application to obtain the bond of indemnity, but must be left as a matter of defence to, or mitigation of damages, in a suit to be brought by the sheriff on the bond.—Corbett, sheriff, v. Smith and Henderson, 13.

3. *Discharge of prisoner. Pleading. Notice to plaintiff of special bail.*] A sheriff cannot justify discharging a prisoner from his custody, surrendered to him by the bail to the sheriff before the return of the writ, by pleading the perfecting the special bail, without shewing, at the same time, that the plaintiff had notice of the special bail and of their justification.—Shouldice v. Fraser, Sheriff, 60.

4. *Resignation. Successor. When old Sheriff out of office.*] A writ of *fi. fa.* was delivered to the sheriff on the 21st of November, 1847, returnable in Hilary Term, 1848. On the 9th of December, 1847, the sheriff tendered to the government his resignation of office—on the 14th of the same month, it was notified to him that his resignation had been accepted, but his successor had not been appointed till after the return of the writ, which was made in the interval. The deputy sheriff, who remained in the office to wind up the old business, made his return to the writ, and in an action against the sheriff for a false return, it was *Held, per Cur.*, that under the facts proved, the sheriff must be considered in office at the return of the writ, and liable upon the return

made.—Ross et al. v. McMartin, Sheriff, 179.

5. *Trespass. Evidence of fi. fa. and judgment.*] In an action of trespass for taking goods brought against the sheriff acting under a *fi. fa.*, proof of the judgment and *fi. fa.* by the sheriff is indispensable only in cases where the question turns exclusively upon the fact whether the goods have been fraudulently assigned by the execution debtor to the plaintiff.—Culbert v. Conger, sheriff, 395.

SHERIFF'S SALE.

1. *Execution debtor. Goods purchased at sale by execution creditor lent to execution debtor. Subsequent execution creditors.*] Where goods have been openly set up under a *fi. fa.* and *bona fide* bought by the execution creditor, he may, if he pleases, lend them immediately after sale to the execution debtor, and while in his possession, they cannot be seized by the sheriff at the suit of subsequent execution creditors. And where they had been so seized, and the sheriff was sued in trespass by the execution debtor, and the jury found for the defendant upon a direction from the judge that such arrangements must be looked at as in themselves, without reference to the facts of the case, inconsistent with good faith and the right of subsequent creditors—the court set aside the verdict for misdirection, and granted a new trial, with costs to abide the event.—Williams v. McDonald, sheriff, 381.

STATUTES,

CONSTRUCTION OF, ETC.

8 Vic. ch. 45.—See “Money paid.”

1 Wm. IV. c. 8.—See ‘Ejectment.’

7 *Wm. IV. chap. 59.*—See “Ejectment.”

43 *Geo. III. ch. 5*; 59 *Geo. III. ch. 3*; 1 *Wm. IV. ch. 2.*—See “Feme Couverte.”

10 & 11 *Vic. chap. 6.*—See “District Council.”

4 & 5 *Vic. ch. 10, sec. 46.*—See “District Council.”

8 *Vic. chap. 13, sec. 6.*—See “Judge County Court.”

9 *Vic. ch. 90, sec. 12.*—See “Building Society.”

3 *Vic. ch. 74. Church Temporalities Act.*—See “Wills.”

4 & 5 *Vic. ch. 3, and 8 Vic. ch. 37.]* See “Clerk of Division Court.”

11 *Vic. ch. 14.]* See “Consumer’s Gas Co.”

1. 12 *Vic. ch. 22.]* The statute of 12 *Vic. ch. 22* respecting *presentment* to the makers of notes and inland bills of exchange, does not apply to Upper Canada.—*Ridout et al. v. Manning et al.* 35.

2. 7. *Vic. ch. 18, sec. 16.]* See “Lower Canada;” Doe on several demises of Park, of Hunt, and of Henry Desrivieres et ux., and of Austin Cuvillier et ux., v Reuben Henderson, 182.

3. 5 *Geo. II. ch. 7. Land Sale. Fi. fa.]* Land not being bound by a judgment for the purpose of sale under 5 *Geo. II. ch. 7*, but only by the delivery of the *fi. fa.* against lands to the sheriff, the time of such delivery should be proved by the purchaser under the sheriff’s deed; and where this proof had been omitted and a verdict had been given for the plaintiff, with leave to the defendant to move for a nonsuit, the court declined nonsuiting the plaintiff, but gave him a new trial on payment of costs.—*Doe dem. Burnham v. Simmonds*, 196.

4. *Verbal bargain. Sale of land. Penalty.* 32 *Henry VIII. ch. 9. Title.]* A mere verbal bargain for the sale of land will not subject a person to the penalty of the statute 32 *Henry VIII. ch. 9*, for buying a pretended title.—*Aubrey, qui tam v. Smith*, 213.

5. *Admission. Deed. Party out of possession.]* A person cannot be convicted under the statute of *Henry VIII.* merely on his own admission that he has taken a deed from a party out of possession; some evidence *aliunde* must be adduced of the existence of such a deed.—*Aubrey qui tam v. Smith*, 213.

6. 6 *Vic. ch. 27, sec. 19.]* See *McDonell et al.*, assignees of Donald Bethune, a bankrupt, v. The Bank of Upper Canada, 252.

7. 4. & 5 *Vic. ch. 26, sec. 40. Month’s notice of action, what is.]* The court held that the act requires a clear month’s notice of action exclusive of first and last days.—*Dempsey v. Dougherty et al.* 313.

8. 12 *Vic. ch. 70. Who is a competent witness.]* See “Witness,” 2.

9. *Ordinance-vesting Act, 7 Vic. ch. 11, 4th clause]* The 4th clause of the ordinance-vesting act, 7 *Vic. ch. 11*, only protects persons who, at the time of the act passing, held an assurance derived under the officer in charge of the ordinance of some certain and existing estate or interest in any portions of the lands about to be vested in the ordinance: a party, therefore, who produced merely a written receipt of rent from the ordinance officer, but could not shew any lease in existence at the time of the land being vested in the ordinance, or that a term had

ever been created, was held not to come within the protection of the act.—*Doe dem. Musgrove v. L'Esperance*, 343.

10. 5 *Anne*, ch. 16. *Joint Tenants*, &c.] Under the statute 5 *Anne*, ch. 16, one tenant in common or joint tenant may be sued as bailiff in an action of account, whenever he has entered and taken more than his just share of the profits, whether by appointment of his co-tenant or not.—*Gregory et ux. v. Connolly*, 500.

Semble, that co-parceners not coming within the statute 5 *Anne*, ch. 16, sec. 27, cannot sue each other in an action of account; this point, however, was not expressly decided, as the court held that in this case the facts showed that the defendant entered into possession of the land, not as a co-parcener claiming through his wife and in privity with the plaintiff, but as an executor claiming adversely to the plaintiff without his consent; and that on that ground the action of account would not lie.—*Gregory et ux. v. Connolly*, 500.

11. *Registry Act*, 9 *Vic. ch.* 36, 6th *Clause*. *Valuable consideration—Proof of, necessary.*] A party who claims under a subsequent conveyance, and seeks to displace the first by reason of the prior registry of his deed, must, before he can recover in ejectment, give some proof that he stands in the position of a purchaser or mortgagee for valuable consideration. The production of the subsequent deed, stating on the face of it a valuable consideration—affording no evidence of consideration as against a stranger—will not do.—*Doe on the several demises of Luther Herrick Cronk and Edward Enoch Skae v. Smith*, 376.

12. *Smuggling*. 8 & 9 *Vic. ch.* 93, sec. 66.] *Quere*—Would an information lie under the 66th clause of the Imperial Act 8 & 9 *Vic. ch.* 93, where the party informed against was a person shewn not to have transported or harboured the goods of another, but his own goods, smuggled by himself on his own account?—*The Attorney General v. Warner*, 399.

TAXES.

1. *Payment of. How far available towards a title.*] *Semble*, that the payment of taxes in itself signifies nothing in making good a title under twenty years' possession.—*Doe dem. Angus McDonell v. Rattray*, 321.

TITLE.

See "Taxes."

TOLLS.

1. *Tolls—when to be collected on Vaughan Branch, &c.*] *Semble*, that Tolls on Vaughan Branch of Albion Plank Road can only be collected when the road is made, according to the requisition contained in the 33rd section of stat. 9 *Vic. ch.* 88.—*The Queen v. Haystead*, 9.

TRESPASS.

1. *No distinction between "assaulting" and "causing to be assaulted."*] A declaration in trespass charging the defendant with *having caused* the plaintiff to be assaulted and imprisoned, is good.—*Robertson v. Cooley et al.*, 21.

2. *Proof of. Notice of action.*] In an action against a magistrate, a plaintiff is not bound to prove every trespass that he has described in his notice; he may prove what he can, and recover

for what he proves, provided it is such an injury as is stated in the notice.—*Byrnes v. Wild & Ellis*, 104.

3. *Who may sue. Prochein ami.*] The mother, in possession of the land belonging to the heir, a minor, may sue in trespass, *qu. cl. fre.* as the real friend of the minor.—*Robert Johnson by Catherine Johnson, his next friend, v. McGillis*, 309.

4. *Growing Timber, when considered as Chattels. Trespass.*] Where plaintiff declared in trespass, for that defendant on, &c. with force and arms, felled, &c. the trees (*viz.* 115 oak trees) of the plaintiff, then growing and being in and upon certain lands in the County of Middlesex, (not saying on his own land) the court refused to arrest the judgment, on the ground that the plaintiff could not sue for cutting down growing trees as for an injury to chattels, but that the action should have been for trespass to real property, laying the destruction of the trees as aggravation.—*McMillan v. Miller*, 544.

TROVER.

See "Damages," 2.

1. *When maintainable for Fixtures.*] Trover cannot be maintained for a fixture, so long as it remains annexed to the freehold.—*Oates v. Cameron*, 228.

USURY.

1. *Lumbering trade. Agreement void.*] An agreement that A. B. should allow C. & D. (lumberers upon the Ottawa), in addition to legal interest, a further sum of four per cent. upon all monies so advanced, for the purpose of getting out timber, is usurious and void.—*Bryson et al. v. Clandinan*, 198.

2. *Taking lumber as security only for advances, and taking it absolutely. Effect as regards.*] If A. and B., instead of being mortgagees, holding the timber merely as security for monies advanced under such an usurious agreement, had taken the timber absolutely in payment of their account for advances, then, although their account might have included usurious interest, the property, after it had so become theirs, could not have been divested on that ground.—*Id.*

VARIANCE.

See "Trespass," 2.

1. *Rule of court. Marginal reference.*] Where, to an act of trespass, the defendant pleaded "not guilty," and inserted in the margin "according to the statute," instead of "by statute:" *Held per Cur.*, marginal reference sufficient.—*Robertson v. Cooley et al.*, 305.

2. *Recognizance of bail. Foreign country.*] Variance between a recognizance of bail, entered into in a foreign country, as stated in the declaration and proved.—*Short v. Kingsmill and Davis*, 350.

3. *Plea. Prior action. Variance.*] When, to an action brought by plaintiff on the common counts, the defendant pleaded a prior suit between the same parties for the same identical cause of action, and prayed an inspection of the record; and it appeared, on inspection, that the plaintiff's name in the former suit was James W. Whyte, and in the second James M. Whyte: *Held per Cur.*, a fatal variance.—*Alexander Whyte and James M. Whyte v. Cameron*, 378.

Quære: How far the declaration in the two suits varying as to the number and return of the common

counts, and the amount claimed, would be considered fatal.—*Ib.*

4. *Declaration. Bond. Variance between.*] The plaintiffs, by the name of the Council of the District of Brock, declared in debt on bond: the declaration stated that the defendants acknowledged themselves to be held and firmly bound to the said plaintiffs: the bond, when produced at the trial, was found to be given "to the Municipal Council of the Brock District,"—the bond was not set out on Oyer: *Held per Cur.*, variance not fatal.—Brock District Council v. Brown, Daniels and Rownds, 471.

5. *Bond, with condition. Declaration on common money bond.*] The plaintiffs, who had taken from the defendants a bond for the due performance of a collector of rates' duty, with a condition in the former, prescribed by certain municipal by-laws, declared upon this bond, as upon a common money bond, without setting out the condition; the defendants pleaded *non est factum*. *Held per Cur.*, that upon this plea, the condition being only a defeazance, and not a part of the bond, the bond, as set out without the condition, was a valid bond; that there was no fatal variance, and that the plaintiffs were entitled to recover: it would have been better, however, for the plaintiffs to have set out the condition in their declaration, and to have assigned breaches.—*Ib.*

6. *Declaration. Foreign bill.*] Where a bill had been so declared upon, as not to shew it to have been a foreign bill, drawn in Toronto on a party in New York: *Held per Cur.*, that this was not variance upon which a nonsuit

could be granted.—Boyer v. Joseph, 505.

VENIRE DE NOVO.

1. *Special damages. Special count bad. Common count. Evidence.*] When there is a special count and common count in the declaration, the effect of the special count being bad when special damages have been assessed is that there must be a "*venire de novo*," unless it can be said that the verdict was given wholly upon evidence applicable to the common counts alone, and not to the special counts.—Dodge v. Muir, 526.

VERDICT.

1. *Setting aside of. Record. Nisi prius clause.*] Verdict set aside on account of there being no proper nisi prius clause in the record.—Doe dem. Murphy v. McGuire et al., 312.

2. *Setting aside of. Excessive damages.*] *Held also*, that a verdict of 1000*l.* against the defendant, under the circumstances of the case (as fully set out in the statement), though in the opinion of the court excessive, could not be set aside on that ground.—Robertson v. Meyers, 424.

3. *Intendment after.*] Where the declaration avers that the defendant came as a guest and was so received, the intendment after verdict will be, that the relation thus begun continued till it was interrupted by the wrongful act of the defendant, nothing being stated to the contrary.—Whiting v. Mills, 450.

4. *Debt on bond. Breaches not assigned. Penalty. Irregularity.*] In debt on bond, to take a verdict for the penalty where breaches have not been suggested or assigned in the replication, and

the bond comes clearly under the statute 8 & 9 Wm. III., is irregular, and the verdict may be set aside.—*Brock District Council v. Bowen, Daniels and Rownds*, 471.

Semble—that the breaches may be suggested even after verdict, and then the plaintiff may go down again before a jury and assess his damages.—*Ib.*

WARRANT.

1. *Constable. Contempt. Costs.*]

A warrant to a constable to commit for contempt, containing a direction to detain the party till he shall pay the costs of his apprehension and conveyance to gaol, is defective.—*In re A. W. Clarke and W. H. Heermans*, committed for contempt, 223.

2. *Commitment. Time. Costs.*] A magistrate's warrant of commitment for an indefinite time is bad. A commitment is also bad which directs the prisoner to be kept in custody till the costs are paid, without stating what is the amount of costs.—*Dawson v. Fraser*, 391.

Quære—In a case on arrest, for want of finding sureties for the peace, is it necessary to state on the face of it that the justice had information on oath which would justify him in binding the prisoner to keep the peace?—*Ib.*

Semble—This would not be necessary in respect to warrants committing prisoners upon charges of offences committed.—*Ib.*

WILL.

"See Evidence," 3.

1. *Will. Conveyance. Church Temporalities' Act.*] A will is, in contemplation of law, a "conveyance." Under the terms, therefore, of the 16th clause of the 3rd Vic. ch. 74, viz: "by deed or convey-

ance," a person may devise as well as grant by deed, lands to the Church of England, for the purposes of that act.—*Doe Baker v. Clark*, 44.

2. *Codicil, how considered. Will when perfect, as a conveyance. Effect of, when felt. Stat. 3 Vic. ch. 74, sec. 16.*] A. makes his will in 1843, in 1846, he adds a codicil to the will, merely appointing a new executor "of his will, written above." *Held per Cur.*, that the codicil was a confirmation, and not a revocation of the will, and that the will must still be considered as a will made and executed in 1843. *Held also* (McLean, J. dissentiente,) that the will, as a conveyance, was perfect at the time of its execution, though its effect could not be felt till the death of the testator, and that therefore the condition of the 16th clause of the act 3 Vic. ch. 74, requiring "a deed or conveyance to be made and executed six months at least before the death of the person conveying the same," might be complied with in the case of a will.—*Ib.*

3. *To whom devise may be made under 3 Vic. ch. 74, Sec. 16.*] A devise, under the statute 3 Vic. ch. 74, made to the Bishop and the Rector, is good, notwithstanding the statute speaks of a conveyance to the Bishop or Rector, &c.—*Ib.*

4. *Registration.*] It is no objection to lot 22 passing under the will, that the registration of such a will, changed in its most material contents, can afford no information on the face of it as to what lands are affected by it.—*Doe Lowry v. Grant*, 125.

5. *Construction of. Fee Simple. Estate tail. Illegal Restriction.*

tions.] A. being seized of certain lands, devised them to his son John, "to hold to him and his heirs forever;" and then added, "My will is, that none of my sons shall have power to alienate the lands, thus bequeathed to them respectively, but they shall transmit them from father to son or the next nearest heir, so that they may be always preserved in the family, *Held, per Cur.* that under this devise, John took an estate tail by implication, and that the restriction in the will, being only such as distinguished estate in tail, was not an illegal restriction.—Doe dem. Duncan McIntyre v. Betsey McIntyre and Archibald Mc-Arthurs, 156.

6. *Construction of. Estate for life, or Estate in fee.*] *Held per Cur.*, that a devise to the testator's wife, of land, "to be at her will and disposal during her life," with a subsequent direction in the will as to what should become of the estate after the wife's decease, gave the widow only an estate for life and not an estate in fee—Doe dem. Keeler v. Collins, 519.

7. *Will—construction of—as to whether an estate for life, or in fee passed. Dower—where estate contingent.*] A testator, after making specific devises of certain lands, then adds, "at which time (i. e., after his youngest son shall have arrived at the age of 21 years), it is my will that the whole of my lands be divided into four equal parts,—one part of which I give and bequeath to my two daughters, Catharine and Sarah, the other three parts to be divided amongst my three sons, John, Peter and Simon." *Semble*, that under this devise of the residuary estate, the devisees took not a vested estate, but a contingent and

future estate, and *that for life only*; the estate, in the mean time, vesting in the heir at law. *Semble* also, that the heir at law would then have an estate, which would not entitle his widow to her *claim for dower*; the estate not being a beneficial estate of inheritance, but a mere temporary interest of uncertain duration, contingent upon a distribution being made in pursuance of the will.—McClellan et ux. v. Meggatt et al., 554.

WITNESS.

1. *Widow. Dower. Title of husband.*] A widow woman, notwithstanding her right to dower, is a competent witness to prove the pedigree of her husband and his title to land.—Doe on several demises of Park, of Hunt, and of Henry Desrivieres and his wife, and of Austin Cuvillier and his wife, v. Reuben Henderson, 182.

2. *Who may be, under 12 Vic. ch. 70.*] Since the passing of the act 12 Vic. ch. 70, A., who had been sued in ejectment and allowed judgment to go against him by default, is a competent witness in favor of B. bringing his ejectment for the same lot, and relying upon A.'s evidence to prove that notwithstanding his (A.'s) possession, B. was the party who had the legal title.—Doe dem. Angus McDonell v. Rattray, 321.

3. *Exception in statute 12 Vic. ch. 70. Witness beneficially interested.*] *Semble*, that the exception in the statute 12 Vic. ch. 70, excluding the testimony "of the person in whose individual behalf this action was brought," applies only to those cases where the plaintiff is only a nominal plaintiff and the witness the person beneficially interested in the subject matter.—Ib.

WORK AND LABOR.

1. *Contract. What extra work*] *Held per Cur.*, that under the agreement and facts proved, the extra work claimed for by the plaintiff, must be considered not extra work done under the contract as part of the original job, but as work done under a subsequent new agreement, wholly de-

viating from the former contract, and which could not be in any sense be regarded as work done upon the terms of the original contract, either as to time or mode of payment, and that the plaintiff might recover for such work under the account stated.—Watson v. O'Beirne, 345.

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